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ADDITIONAL REMARKS

UPON

THE QUESTION

OF THE

LENNOX OR RUSKY REPRESENTATION,

AND OTHER TOPICS,

IN ANSWER TO THE

AUTHOR OF "HISTORY OF THE PARTITION OF THE LENNOX,"

&c.

WITH AN *ECLAIRCISSEMENT* AS TO THE DISCUSSIONS

ABOUT RICHARD II.

BY

JOHN RIDDELL, ESQ.

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PREFACE.

OWING to the consideration already bestowed by the Author upon the Lennox question, and its general unimportance, he had little, if any serious intention of reverting to the subject. Neither were the recent lucubrations of Mr. Mark Napier, calculated to shake it. The learned gentleman, if we may use the phrase, seems to become intoxicated by the mere sound of his words, and the deceitful lustre with which his conceptions are thereby invested in his own mind, are sadly contrasted with the total absence of real authority and argument. His big and portentous throes lead, in every instance, to uniform results—either sure abortion or ruin—after the full stretch and exhaustion of his labours. Yet as his clamorous tone might chance to mislead the uninitiated, the Author, whose opinions are widely different, has been tempted to resume the pen, and reply to observations, upon the whole but little worthy of serious criticism or comment. They involve, as will be

seen, other discussions besides the one that has been alluded to.

The conclusions to which he leant when he last wrote, have been confirmed by subsequent researches; and it is a curious feature in the present controversy, that the documents adduced by the encomiast of Merchiston, have wofully recoiled upon himself, and subverted the very arguments that they were intended to support.

The writer has also been induced to defend himself from a charge in the case of a separate matter, (that of Richard II.,) which has been recklessly made in the face of glaring circumstances that refute it. In doing so, he has been led into digressions whose introduction is owing to their relation with certain points rather of importance, chiefly connected with our history.

Whatever may be the true character of anti-quaries—whether their reasoning, according to Horace Walpole, resemble the logic of *certain* matrons, to many, no doubt, they may seem of the *irritable genus*, and hence referrible to a higher species, from the heat and keenness observable in their discussions—and in this case, especially, on the opposite side. The thing is the more remarkable, owing to the secondary topics that often excite them. Yet is it not either destitute of advantage—for without such concomitant—from the meagre and repulsive nature of the last—the interest would be wanting that enhances other pursuits; and hence the admixture of

a little repartee and altercation—palliatives here to the *absinthia tetra*—may enable those to swallow what, in the absence of the attraction, might be odious and distasteful. At the same time, it is freely confessed that such disputes are frequently rather ludicrous, being actually in other words *tempestas in matula*.

In justice to himself, though bearing upon a matter of private interest, broached by Mr. Napier in his last preface, the author can only say, that at the numerous visits (besides conversations elsewhere) paid him, of his own accord, long ago by the former, he freely communicated to him his facts and views at the time, relative to the Lennox question. These involved the descent of the Earldom, state of the representation, the alleged forfeiture, messuage, and “sequence” arguments, &c., besides the nature of the Haldane and Woodhead claim, forming, it is apprehended, its very essence and substance. Although Mr. Napier affirms that he was previously aware of the messuage, and “sequence” arguments—merely briefly, however, through an extraneous source¹—yet he admits that they originated solely with the author—who then fully, and for the first time, stated and explained them to him, with all their conceived import and bearings, and hence, is plainly justified in the assertion in his Tracts, that he communicated p. 103.

¹ From their being mentioned by the Author at a distant period, to Francis, Lord Napier, grandfather of the present Peer.

them to him, as there mentioned. The same arguments which have since been triumphantly used by Mr. Napier in his history, are conceived to be all that can give color or plausibility to a Napier claim. The additional one that he has attempted, turning upon the grant of the *maritagium* in 1455, &c. with others still more fragile, are futile and irrelevant, as will afterwards be shewn. Of the cardinal, and sole props of his case, therefore, he was completely ignorant, until he gleaned them first briefly in a circuitous manner, and then fully, as above stated,—and in both alternatives, whether thus directly, or indirectly, exclusively from the author.

That the learned gentleman did not profit by his communications, as he coldly proclaims to the public, may rather, it is thought, affect himself than them—*mortifying* though it be to his opponent that such should be the fate of interviews, wholly engrossed with the Lennox question, the main subject of his work—actually, as has been seen, embracing the former (with other co-incidencies)—and in the impression, as he knows, of their being professional. If they were so jejune, and unproductive too, as would seem to follow, why, it may be asked, were they so often repeated?—He elsewhere, too flatteringly affirms, that the author was the best, and most ripely fitted to draw up a Lennox Case—may there not then have transpired on these occasions something of a less dilutescent quality?

The biographer of Merchiston is either prone to

too great complaisance, or acrimony in his remarks, owing to which his adversary is somewhat placed in the situation of the traveller in the fable, between the impulses of the sun and the wind, although here, as in that instance, the genial influence of the one may overcome the other, and compensate for inadvertencies. The writer feels it incumbent, in proof of what is advanced, to take the liberty of quoting these passages from a letter of his, (not confidential,) which he received in February last, and with the less scruple, as they are far from containing any thing that may offend, nay, it is rather thought they may be satisfactory to him—"I strongly recommended *him*, (*the last Lord Napier*, he states,) not to trust to his own judgment in *the matter*, (*the Lennox case*,) nor to myself, but to engage Mr. Riddell to prepare a complete legal case, if his Lordship really meant to press his claim in Parliament. The reason I gave was, that *you*, (*the author*,) was very versant in Peerage Law, and had long investigated this case." This is mentioned while Mr. Napier adds, that he had at the period that has been alluded to, "various conversations (with his correspondent) upon the Lennox claim." Thereafter, he says, "Lord Napier was under the impression, *and so was I*, that, as *you had all the known materials that seemed attainable*, it would not take many months to prepare the case." The learned gentleman, it is submitted, could not have ascertained the last fact, except by personal intercourse relative to identical par-

ticulars comprised in his work, which could only have been through the *medium* of the interviews—that were actively proceeding at the time—as they had not canvassed the subject before. And if the party here “had *all* the known materials that seemed attainable,” he was not the individual, it is thought, likely to give unprofitable information, but *e contra*. The former has surely overlooked these circumstances. In a subsequent letter connected with the same topic, he says that he told his principal that the author “could do *it*, (the *Lennox case*,) more justice than himself;” hence, directly, and further admitting his superior *lumières* and insight into the question, and command of important and better information, (necessarily transpiring from the interviews,) which, according to every just and moral conclusion, must have put him more *au fait* in writing his history. Such, indeed, would seem the natural induction, unless it may be made appear that the mind of the person addressed, was, after all, a mere *tabula rasa*, and innocent of acquaintance with *Lennox*, a *most tenable* proposition surely, after what has been premised.¹

It may be also mentioned here, that he saw the last Lord Napier upon the subject, (on Mr. Napier’s introduction,) for whom he was requested, as counsel, to draw up a petition to the king in reference to his supposed claim, which was accordingly done.

¹ See also afterwards, at ps. xii. xiii.

Than this, however, nothing more was attempted of the kind, for though it had been fixed between them, that he should further have drawn up a Case, yet as his Lordship's relative, the sole organ of mutual communication, thought (as he only lately intimated,) that he had no conclusive powers from his principal legally to put it in train—which was never done—it necessarily fell to the ground. Owing to the latter circumstance, the author is free to admit that he did not commence it, nor had serious thoughts of embarking in so intricate a subject that demanded various accessories; and *in hoc statu*, it is rather conceived that his having written the said petition, *irregularly*, along with his other exertions, was as much as could have been expected of him. He was equally, out of common motives of delicacy, and what became him, deterred from attempting to obtrude his sentiments or assistance in the matter after they ceased to be solicited, a step indeed that seemed to import their abnegation.

Long subsequent to this, Mr. Napier became himself the advocate of the supposed claim of his family, a fact first divulged in his *Memoirs of Merchiston*, and he has set forth their pretensions to Lennox with conceived arguments in their favor, minutely, in his last publication. In alluding to the marriage of Elizabeth, the Rusky co-heiress, to John Napier of Merchiston, in the above performance he intimates that it “involves the history of the right to the earldom of Lennox, a subject fully discussed in the

- P. 33. Lennox case for Merchiston at the end of the volume ;” and there is also this passage in the preface,
 P. xii. “ I had intended to have given a complete statement in the Appendix, of the Lennox Case for Merchiston, proving the Philosopher’s, and consequently Lord Napier’s right, to that ancient earldom ; but having occupied more space with the abstract of Napier’s Algebra than I had anticipated, the Case, with genealogical trees of the family, &c., is reserved for publication in another shape. I have retained, however, so much of it as may suffice to meet certain errors that have crept into the History of Scotland.”

This was the first intelligence the author obtained of the design of a Case by Mr. Napier (accidentally from a copy of his work in a Public Library,) in this way drawn up by the learned gentleman, whom he had not seen, or communicated with for a considerable period before. The object of these references and remarks, is to shew—together with the writer never having been retained—that the Lennox case being thus taken up by another—particularly Mr. Napier—he was now quite free to act in a different capacity, and state generally, and unbiassedly—as he has since done—any later views or facts that might have occurred to him, especially under the circumstances.¹ This explanation is unavoidable, after what had preceded, and as it goes to justify the step

¹ See also Tracts, p. 103—4.

that he took ; without here adverting to Mr. Napier, who might naturally be ambitious to vindicate his gentilitial honors—though like another bright and aspiring youth¹—*magnis excidit ausis*,—and it is to be regretted, in the words of his favorite bard, that he

——“hurried to the field
And snatched the spear, but left the shield.”

That the efforts of the Author ceased to be in requisition, and did not prove to be professional, is intrinsically of little moment. Indeed, as things have turned out, there is much reason to rejoice at the event,—though the previous circumstances become important, and are indispensably stated, in case of misapprehension, owing to Mr. Napier's summary notice of the transaction,² and recent scope of his remarks, and lest the author should appear to have

¹ Metaphorically too *currus auriga paterni*, whether his lamented paternal relative *obstrinxit caput radiis*, or he acted alone.

² His only allusion to the matter is the intimation that, several years ago, he consulted “Mr. Riddell verbally, on the subject of the Lennox case for Napier, which they frequently discussed.” This, however, partly corroborates what was stated—after which he cavalierly and sarcastically adds, in striking contrast with his former tone, that from these “desultory conversations,” as he styles the interviews and professional application, “he did not reap the benefit he ought,” (the drift and import of which seems pretty plain) while he declares that “*no part* of the following History is the result of them.”—*Id.*

Hist. of the
Lennox,
Pref. p. x.

made himself more prominent in it than he really was. In the latter view, with the greater reason, as the learned gentleman inculcates, that he obtained no information, or insight, that could benefit his History—in other words, the Lennox Case, *which is clearly identified with it*—from communications at his request,¹—the reverse of which, it is apprehended, must follow from what has been premised.

It, besides, seems rather difficult to reconcile this with the following intimations in a letter he long ago wrote his opponent, which has casually met his eye. “Many thanks (he there says) for *your inclosure, (communications in a written form,*² *about Lennox.*) I am going to beg another favour, which is, that you will again allow me to have for a little the Hamilton case with *your note on the Lennox,*³ which I wish to shew Lord Napier,” &c. In a later one also, after mentioning that he had sent the *first* to his Lordship, with further acknowledgment of

P. 103. ¹ *Ib.* ps. 9—10. In a letter to his opponent he observes, “you are quite right in saying *I applied to you* on the part of Lord Napier.” This, with what has been detailed, fully justifies the allegation in the Tracts, that the Author made his communications (which were prefaced by a professional intimation of Mr. Napier to the same effect), to him at his request—the latter thus applying to him upon the Lennox question, and he giving his facts and sentiments in return. See also what further follows in the text.

² It may be observed that he only has alluded in his History to such as are *verbal*.

³ So Italianized.

their utility, and obligations, he enters into *relative* discussions about the Messuage argument, the Haldane one, and other bearings of the case ; in the course of which he asks the opinion and views of his correspondent, while apologizing for such *rambling*, and fearing, to use his own words, that “ *this* (his rumination) *is sad floundering*.” Things have indeed singularly changed since ; for he thus figures, by his own admission, as a modest “ bog-trotter ” petitioning his adversary, whose former qualifications he now contemns, to help him out of his quag-mire.

The motives that have been alluded to must be the apology for the present statement, that would not otherwise have been gone into,—sufficiently ungrateful to the party, and, of course, palling to the public, and which, although it may have been called for, he feels ashamed to have protracted to this length.

With respect to a casual illustration or two (first adduced by the author in his late performance) of the interests, and succession in general, of heirs portioners, at which Mr. Napier carps, upon the ground that they were not stated to him, though ostensibly, perhaps, appearing to be so¹—making, as it were,

¹ From the manner in which the writer has expressed himself in the following passage, alluding to the communications that have been noticed. “ The above view of things (with the relative evidence), the author communicated, at a distant period, to the late Lord Napier, and a few years ago, to Mr. Mark Napier, advocate, at his request.” It is obvious, however, that the words *Tracts*, p. “ above view of things,” and “ *relative evidence*,” are very general, 103.

a mountain of a wart,—they are, in fact, immaterial, and do not alter the character of the prior communications to the Napiers, which would still be as available as before.¹ In essentials they vary in nothing. Neither, as far as can be remembered, however he may seem to inculcate, is there any other circumstance or argument there—independent of the new evidence for the Haldanes—that had not been antecedently noticed,—at least in substance. Let us see how things stand. There is, first, a simple state of the facts of the case, known previously to Mr. Napier and all antiquaries—next there is the actual “sequence” argument, of course including the entries in the Exchequer Rolls—next there is the Messuage argument; and with a self-evident inference, often sported before, this is all!² Does the learned gentleman seriously contend that this was new to him at the time? If so, he evidently, from what has been shewn, cuts his own throat most unmercifully.

It may seem odd to some, that the author should the first denoting the *jet* of the theory, and the latter, *applicando singula singulis*, the evidence in support of what was stated, respectively, to these individuals regarding it, without reference to subsequent inferior illustrations—a sense in which they were certainly intended to be used.

¹ See also ps. 51—2, note. The quotation in the first of the latter pages, should have been “the above view of things (with the relative evidence)” —instead of “the above view of things, and the relative evidence,” as is there written.

² See Tracts, p. 93, *et. seq.*

stickle about his former authorities and inferences—seeing that recenter discoveries of his have entirely changed the face of matters, and led to an entirely different conclusion—so that, in fact, his opponent, who tenderly adopts the first, must now fight the battle bedizened out in cast-off trappings, and rejected armour. It may be so—but still there must be some regard to accuracy generally, and just views of things. In the meantime, he is heartily welcome to these accoutrements—though second-hand,—which shall now be considered as exclusively his own, as well as the adopted arguments his genuine offspring.

Out of due regard to the purity of the Merchiston pedigree, there is annexed a full copy of the Naturalization of "*Sandy Napier*," the illustrious Luton-hoo ancestor; he who Mr. Napier asserts, was second son of Alexander Napier of Merchiston;—while indignant at any scepticism upon the subject: yet the worthy in question must have been born when the alleged parent could only have been a mere child, if even then in existence. And this, independently of other irrefragable evidence, nullifying the conceit of one who would fain soar above what he oddly styles "Pedigree picking;" the meaning of which phrase, however—not irrelevantly too as its proper parent—may be aptly left to himself to illustrate. The grant, from not arriving early enough, is inserted immediately before the AD-DENDA.

One of the most extraordinary blunders that the former falls into, and sufficient to make most persons titter, is his rendering the common and hack-nied term "*premuniti*"—"fortified beforehand!"—not to add the amusing *bizarrierie* he hence perpetrates—even worse than the case of Lot's wife—of converting two human individuals into actual fortifications.¹ We are not here dealing in tactics, or rather *strategics*—for the art military must surely have been firing his imagination at the time,—but merely recreating in the quiet pursuits of the inoffensive civilian;—and every lawyer, it is believed, except perhaps Mr. Napier, is fully aware of the technical meaning of *premuniti*² or *præmunire* (barbarous corruptions of "premoniti" and "premonere,") denoting *forwarned* and to forewarn, as even Blackstone would have informed him.³ He also (would it be believed?) translates "*premuniti*" following "*premuniti*"—"preliminary security"!⁴ The learned gentleman here suddenly tacks about, and as irrelevantly diverges into the "inglorious" intricacies of conveyancing, and title-deeds. We are insensibly reminded, in this place, of some of the late credulous Dr. Halkerston's *conceived* definitions, or explana-

¹ See History of the Partition of the Lennox, p. 133.

² In old writings *e* (*simply*) is ordinarily used for the diphthong *æ*.

³ Commentaries, Book IV. ch. viii. *first paragraph*—when explaining the words in a common writ of *præmunire*.

⁴ *Hist. ut supra*.

tions of law phrases, which are not a whit more ludicrous. The terms in question, it need not be added, only intimate that parties were charged, or forewarned by a premonition or forewarning, in common form—on this occasion at the instance of the sheriff, or king's officer—specially mentioned along with his letters of execution—to obtemper a decree of the Lords for enforcing the very contract of the Rusky partition in 1485, against the Napiers, who were most ready to discharge it,—and so annihilating in its consequences to the case of their representative.¹

The words in the original may be here fully cited—“premoniti² fuerunt premunitione honorabilis viri Wilelmi Edmonstone de duntreth, ac Senescalli de Mentetht per suas literas patentes.”—*This*, that “they should be fortified beforehand”—forsooth—“by (his) preliminary security”!! If Spelman, our most familiar Lexicographer, had also been looked into, the error would have been quickly detected. “Præmunire (*he says*) Apud *Forenses nostros passim* legitur pro *admonere*, unde celebris illius brevis Regii nomen accepit quod Premunire facias appellatur. *Utuntur* etiam et *eodem sensu nostri sæpe historici*. Sic Jorvalensis in vita Regis Ethelredi—Alfricus Consul fecit (inquit) eorum (Dacorum) exercitum *De insidiis* Regis *præmuniri* : et mox

*Hist. ut
supra, p.
133.*

¹ See present Treatise, p. 13.

² In the Author's excerpt of the deed, it is “premoniti,” and not “premuniti,” as Mr. Napier makes it, though the discrepancy be immaterial.

Daci omnes *præmuniti* evaserunt." How obliged, it may be observed, might the Danes have been to Mr. Napier, if his valuable discovery had been true, for then being "fortified before-hand," they would have maintained their position, instead of taking to dishonorable flight.

EDINBURGH, *August* 1835.

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ERRATA.

- Page 2, line 8, add *ancestor* after *Napier*
— 20, last line, after *in*, add *the case of*
— 35, — 2, *dele* clearly
— 51, — 23, for *and* read *with*, with a bracket before the
latter, and after *evidence*
— 57, — 4, for *the* read *a*
— *ib.* — 5, for *those* read *that*
— 75, — 20, *Menteiths* without comma above the *s*
— 105, — 5, for *Kusky* read *Rusky*
— 110, — 30, a comma after *produced*
— *ib.* — 32, mark of quotation after insert
— 123, — 20, no comma after *exclusively*

ADDITIONAL REMARKS,

&c. &c.

THE material subject in Mr. Napier's late octavo publication, and indeed what may be said to have given rise to it, is the right of representation, in the character of *eldest* heir-general, of the ancient earls of Lennox, which accordingly shall be first discussed—reserving for the sequel some additional topics, which, comparatively, are of inferior importance.

With the *status* in question, the representation, in the same way, of the Menteiths of Rusky, is precisely identified—it being the immediate channel through which the former is derived,—and therefore, whoever is eldest heir-general and representative of Rusky, becomes, in consequence, the eldest heir-general and representative of Lennox. The case unquestionably lies in a nut-shell, although it may appear otherwise from Mr. Napier's diffuse, and, as is conceived, irrelevant argument; and it so happens, notwithstanding the antiquity of the facts at issue, that proof is not wanting satisfactorily to fix it.

B

As is thus manifest, and is indeed admitted by the learned gentleman himself, the senior co-heirship of the Menteiths of Rusky, descended from Margaret, the eldest daughter of Duncan earl of Lennox, who left surviving issue,¹ is all we have to ascertain—or, in other words, was Agnes Menteith the wife of John Haldane, ancestor of Gleneagles, or Elizabeth her sister, the wife of John Napier of Merchiston, who respectively figured after the middle of the fifteenth century, the eldest co-heiress of the above family?

In reference to the point, the writer lately adduced new evidence, that powerfully bears upon the question, and he must humbly maintain, that that evidence, at least when taken along with the other facts and authorities, must be held to be decisive. Owing to this circumstance, and admitting its validity, as it even, *of itself*, refutes the claim of the Napiers, and necessarily Mr. Napier's case and argument in their behalf, while it transfers the elder representation to the Haldanes of Gleneagles, it must again be particularly adverted to.

The Court of Session, by a regular decret on the 29th of July 1562, transferred a “contract allegit maid in presens of ye lordis of consale,” and regis-

¹ She married Robert Menteith of Rusky, and as her father had no lawful male issue, the lineal Lennox representation devolves through her. For some desultory notices connected with this lady, and proof of the subsequent descent from her down to the Rusky co-heiresses, &c. see Appendix, No. I.

tered in their books, "havand ye strenthe of ane decreit of ye lordis yerof" of the date 2d of August 1485, between "umquhile Jhone halden of glenegas for himself, and umquhile James halden his sone, and apperand air for ye tyme, on yat ane pert, and umquhile Jhone naper of Merchiston, and Elizabeth his spous on ye uyer pert,"—"in Jhone haldane of glenegas, successor to ye said umquhile Jhone halden of glenegas, and heretabill possessor of yat ane half of ye forsaidis land, (those to be immediately noticed) wyt ye pertinentis *active*, and in Archibald naper of Merchiston as air, *at ye leist successor*, to umquhile Jhone naper of Merchiston, and portioner and heretabill possessor of ye uyer half yerof *passive*."¹ The contents of the contract,

¹ "Nota, There is a difference inter *hæc duo* to be heir *active*, and to be heir *passive*, for nothing can make a man heir *active* but a retour; but a service albeit not retoured, or a sasine upon a precept of *clare constat* will make him heir *passive*, an apparent heir may possess heirship goods, and dispoise thereupon, albeit he may not pursue for the same." Lord Kerse's *Practiques de hæreditibus*, MS. Ad. Lib. p. 126, b. This seems to be illustrated in the present instance in the case of Napier the heir *passive*, because a protest is taken in 1547, against Alexander Napier of Merchiston his father, that he "libellis him *nevoy* (*grandson*) air, and successor to umquhile Archibald Napier of Merchiston, and because he is not air to him, bot alanerly air to umquhile Alexander his fader, son to ye said umquhile Archibald," &c. Act. Dom. Con. Lib. 28. As far as the author knows there is no service of Archibald in the text to John the husband of Elizabeth Menteith, and the mode of specifying his descent here is remarkable.

whose substance is given to us, are of the highest importance, and instruct a mutual agreement between the above deceased parties "anent ye division, depertising and deling of *ye landis of Ruskie* and *lanerk* in yis maner," "yat ye said umquhile Jhone halden and James his sone, *as eldest portioneris*, suld tak for yer *first chimmeis* of Rusky, *ye place* wytin ye loche of Rusky, and for ye place of ye landis of *lanerik*, *ye place* and *biggingis* of *lanerk*, and yat ye said umquhile Jhone naper and Elizabet his spous¹ to cheise *uyir tua chimmeisse* quheir it plesit yame wytin ye *samin landis*, and to tak *ye bordland of Rusky for yer chimmeis*, gif yai pleise, and foryer suld devoid ye fairsaidis landis in twa evinlie pertis," &c.

The contractors in 1485, John Haldane of Gleneagles, and John Napier of Merchiston, were obviously the husbands of the two Rusky co-heiresses, one of whom, Elizabeth, the wife of Napier, is expressly mentioned, while the other, Agnes, the wife of Haldane, being dead, James their son is substituted in her room; and it is submitted that nothing could be more natural than the step here adopted, referring to a divided succession which especially required some form or arrangement of the kind. In fact, the allotment of the inheritance, either by brief of division, or mutual contract, which is here effected, is always resorted to by heirs portioners

¹ So in the original, "*are*" being probably omitted.

after the *pro indiviso* possession, that obtains in the first instance. In such a transaction, the interests of the parties would necessarily appear, and accordingly, we find that John Haldane, (in right of the courtesy as husband of Agnes,) and James their son, “ *as ELDEST portioneris, suld tak for yer first chimmeis of Rusky ye place wytin ye loche of Rusky,*” &c. while Elizabeth, and John her husband, clearly as the younger Portioners, are to have inferior ones. There is here, therefore, proof clearer than the sun at mid-day, that the Haldanes were the eldest co-heirs, and of a nature not merely presumptive, but direct, removing all cavil, or pretence of such, and nullifying the argument on the other side. The object of the later process of transference was to connect the modern representatives with the interests vested in their ancestors in terms of the contract—and as it is expressly with the “ *CONSENT of ye PERTIIS*” through their procurators—Maister Alexander Manchane “ *appearing for Haldane,*” and Maister Jhone Abircrumby” for Napier, *the “contract”* which, moreover, was “ *schewin and producit before ye saidis lordis,*” is homologated by both, and so far from being impugned by either, receives the utmost force and effect. The decerniture in the action is in these words: The Court “ *decernis, and ordanis siclike lettres to be direct at ye instance of ye saide Johne haldane against ye said Archibald naper of Merchiston, for compelling of him to fulfill the forsaid contract in all points, after the tenor of*

ye samyn, as myt, or suld heife bene direct at ye instance of ye said umquhile John haldane against ye said umquhile John Naper of Merchastone for compelling of him to fulfill ye foresaid contract and decreit after ye forme and tenor yerof."¹ In this manner the proceeding closes without any remonstrance on the part of Napier, or attempt to overturn the judgment—to which he was a willing party—and thus satisfactorily settles the question both for himself and his descendants. The use of the word "compelling" in the decerniture, in reference to the latter, is of a piece with the assumption of forgery of deeds in a reduction, with the view of attaining more effectually the *stimulus* and application of law; and although there may have been disputes, or variances, between the Napiers and Haldanes about the minute discharge of articles of the agreement, there were none, as far as can be discovered, as to its material import—far less about the question of seniority.

It may be here observed that there is a previous imperfect entry of the Decreet, which evidently gives a *literal* transcript of the most material part of the contract to the effect above mentioned,² and

¹ For a copy of the Decreet, see Appendix No. II.

² Acts and Decrees of Council and Session, Vol. xxiv. f. 441. The Contract thus begins, "At Edinburgh ye secund day of August ye yer of God four hundreth four scoir five yeris, in presens of ye lordis of counsale underwrittin, that is to say ane maist Reverend fader, and Reverend faideris in God Williame bishope

either the place of the record being inconvenient, or it being thought better to model the procedure in a more condensed form, as often happens in such instances, the former has not been completed. But one thing, moreover, transpires, that the contract was a very solemn one, and that the Lords of Council, in whose presence, and by whose sanction it was perfected, consisted of the first dignitaries of the kingdom—comprizing four Bishops, (among whom was the Primate,) the Chancellor, and Secretary of State, five distinguished noblemen, besides other leading characters.

After due inspection, and consideration of the matter, there cannot, it is apprehended, be a more palpable, or self-evident case—or more exclusive of suspicion—this, at least, must be admitted until the credit of the transactions be shaken, of which there is not a trace or presumption. On the other hand, there is the formal admission of their validity by the best judges—those immediately concerned—backed by solemn interpositions of the Supreme Court, at periods when such testimony is most trustworthy, and hardly capable of being questioned,—and, independent of this, other circumstances will transpire, in the sequel, additionally to authenticate it.

Mr. Napier not only denies—what, however, follows from the judicial record, that there is proof of the

of Sanctandreis,” &c. &c. It has the clause of the Haldane preference, their being “*eldast portioneris*,” &c.

P. 129.¹ existence of the contract, but roundly asserts that
 P. 122. the relative procedure including the decret of the Court of Session, "would not be received as evidence of the particular point, before any tribunal!" Is it thus that he ventures upon the suicidal act of aspersing, nay nullifying a solemn judgment of that Court of which he is a member, and in whose fame and integrity, he cannot but feel a degree of kindred exultation? It is, however, indisputable, independent of their intrinsic weight, that its acts and decreets have been received as evidence in Peerage claims by the House of Lords,² and they are most relevant here, when bearing upon a Scottish point to which they were exclusively competent. Mr. Napier has nothing to invalidate the proceedings in question, and his *consistency* is *extreme*, when thus contemning legal evidence, he stakes his argument regarding the descent of his alleged cousins, the English Napiers, upon proof of the peculiar character that will afterwards be described. As in all sophisms, there is something that betrays the error, so Mr. Napier's argument is *sibi dispar*. He at one time strangely denies there is proof of the existence of the contract, but, at another, he connects it with a previous transaction, and, in reference to a

¹ The references to Mr. Napier's Book, will, for the most part, be made in this manner upon the margin.

² This happened in the claims to the Sutherland and Roxburgh Honours.

charge of illegality, or usurpation against the Haldanes. P. 131.

The learned gentleman lays great stress upon a spulzie and ejectments by the latter, of Napier, and his sister Janet, from a barn and byre, followed by an interim possession, in usual form, granted to Napier, until the matter should be decided by the Lords of Council. But any inference to be drawn from this "very violent and illegal conduct," as it is termed, is on the other side, as the asserted perpetrations being in 1482, may have been an additional motive for the contract and adjustment in 1485, fixing the respective possessions of Rusky, which was by decret of the same tribunal, and may derive from the incident further strength and consistency. There is an indirect effort,—in fact, just alluded to—to explain Haldane's alleged usurpation in 1485, (of the principal chimmeises evidently) by the shocking enormity of his conduct upon this occasion, which was comparatively but a slight symptom of violence or oppression, as such acts abounded at the time, and were often a kind of fiction, or form, to bring a question effectually before a court of Law. P. 130. Ibid.

But Mr. Napier apprehends he has found an antidote to the preceding formidable evidence, in a protest in 1485, upon which he confidently argues, adducing it as his redoubted *cheval de guerre* in the controversy. There are, however, some things in the document rather of a significant import, which

he has overlooked in his hurry. No doubt John Napier and his wife, the co-heiress, are proved by it to have protested against an act of John Haldane of Gleneagles, in reference to implementing the partition of Rusky; but their protest is merely confined to the forms and validity of the Commission, or power of Attorney, that had been granted by the latter for carrying it into effect. They maintain, in the first place, that it was invalid because it only ran in the name of John Haldane of Gleneagles, the father, without mention of James his son, the fiar in the property, and the heir of Agnes, who ought to have been a party. Secondly, that no definite term had been allotted for the purpose, as was required by law. The instrument so far makes nothing for Mr. Napier,—but while such is the case, there transpires a fact of sinister consequences in the third objection—that under the same power or commission granted by Haldane, although he was to *take* and *receive* the principal mansions or chemises of Rusky and Lanerky; there was no mention that they were to be *given* to be *inspected*, or *measured* for the behoof of John Napier, and Elizabeth his spouse.¹ This circum-

¹ “Ex eo quod potestatem sepredictus Johannes Lauder, *Roberto (Cunningham)* suo procuratori dedit, et exhibuit *capiendi*, et *re-cipiendi* suo nomine *mansiones principales le chemises* de Rusky et lanerky; et ad *dandas, videndas, seu mensurandas principales le chemises* in dictis terris de Rusky et lanerky, *pro dictis Johanne Napier, et Elisabet, ejus spouse minime mentionem fecit.*”

stance is indeed conclusive; for it is inculcated by the *Regiam*—"established authority," as Mr. Napier says at the time—that although the eldest heir-portioner such as Haldane, was entitled to the principal messuage, yet *recompense was due for it to the younger one*;¹ with a view to which last

¹ "Salvo tamen messuagio capitali primogenitæ (pro dignitate primogenituræ) *ita quod in aliis rebus satisfaciatur—ad valentiam.*" Lib. ii. c. 28, § 3, c. 27, § 4. We were here assimilated to English practice. Blackstone says, "The mansion-house, common of estovers, &c., shall not be divided, but the eldest sister, if she pleases, shall have them, *and make the others a reasonable satisfaction in other parts of the inheritance.*" Inst. B. ii. c. 12, § iii. It is also obvious from the curious, and ancient instance of the Earldom of Menteith, alluded to by Winton, that this originally was our law; and that the half of the succession competent to the inferior co-heir, though not containing the principal messuage, which went to the other with her portion, was to be made as good "in all profyt," or emolument. Alexander III., with the advice of his Parliament in 1285 decided the claim to that earldom by two co-heirs in this manner, He divided the fief into two portions:—

———"and ye tane of ya
With the Chemys assygnyd he,
Til Walter Stewart, ye lave to be
Made als gud in all profyt,
Schyre William Comyn til hawe yat gwyt."

B. VII.
C. X.
l. 448, &c.

Walter Stewart, possessor of the chemise, and therefore Earl of Menteith, was husband of one co-heiress, and Sir William Comyn of the other. The elder in this instance had lost her principal right, owing to the feudal delinquency of her mother, the original elder co-heiress, by marrying an Englishman, which was transferred to the husband of the younger; but this makes

claim, inherent in the Napiers—and for its due and proper adjustment, this actual inspection and measurement, necessarily preparatory to a valuation and recompense, is insisted upon.

The fact, indeed, of the *taking* and *receiving* the principal messuages by Haldane, evidently not objected to by his opponents,¹ to whom the plea of non-inspection and mensuration alone applies, while in perfect unison with the contract in 1485, at once decides the question against Mr. Napier, who has made a futile effort to save himself; nay, *incidit in Scyllam* cupiens vitare Charibdim.² And thus, at an unfortunate moment, notwithstanding his own experience, and that of his great ancestor, he has erred in his log, and steered wrongly, the consequence of which has been the shipwreck of his case! The principal messuages alluded to—those of Rusky and Lanerky, as has been shewn, were to go to Haldane alone, while inferior ones on the same lands were

See excerpt
ut supra,
p. 4.

See Tracts
Legal and
Historical,
p. 99.

no difference in the jet of the case. The law has gradually settled down to its present state, as instanced by the case of Orchardton, lately adduced by the author. It is indisputable, that there must have been an inspection and measurement of the subject in question, to fix the amount of what might constitute the *valentia*, or recompense.

¹ This will immediately appear more plainly.

² Since writing the above, the author has learned with concern, that the estimable gentleman (having gone to Malta) is actually in the neighbourhood of Scylla and Charibdis. *Dii avertant omen!*—may the father of the winds—obstrictis aliis *præter Iapyga*—reddat nobis Virgilium incolumen—*finibus Atticis*.

allotted to the Napiers. But the matter does not rest here, for this treacherous instrument, so far from prejudicing, far less disproving the contract for which it is triumphantly adduced, turns out again to be its warmest advocate and auxiliary. The contract is dated the 2d of August 1485, and while the former, which has nothing else remarkable, and is shortly thereafter, is dated the 4th of October in the same year—thus allowing time for the sanction and decret of the Court,—it contains this important clause—That Elizabeth Menteith, and John her husband “*protestaverunt quod ipsi prompti, et parati fuerunt, in OMNIBUS, faciendum, PERIMPLENDUM, capiendum, et CONSERVANDUM DECRETUM, et ordinationem DOMINORUM CONCILII secundum tenorem COMPROMISSI, prout premoniti FUERUNT* premunitione honorabilis viri Wilhelmi Edmonstone de duntreth, ac Senescalli de Menteith per suas literas patentes¹ et quod dicta divisio

¹ Mr Napier's excerpt here is not in the original words, but a translation, and has some clerical errors. It is as follows—they “protested that they were ready to *act upon*, take *out*, fulfil, and *record* a decree, and ordination of the Lords of Council, in terms of an award, according as they *should be fortified before hand* by the *preliminary security* of an honourable man, William Edmonstone of Duntreath, and Sheriff of Menteith, by his Letters Patent.” The manifest translation seems to be, “They protested that they were ready, and prepared, in all things, to act upon *implement*, take (or adopt) and preserve, (or observe) the decree and ordinance of the Lords of Council, according to the tenor of the contract; as they have been premonished by the pre-

P. 133.

dictarum terrarum de Rusky, ac captio mansionum earundem erat cassata in defectu dictorum Johannis hauden, et Jacobi ejus filii, et non defectu suorum Johannis, et Elizabethe, et ideo protestaverunt."

There can be no doubt that the *contract* (*compromissio*)¹ which was by the authority, and decret of the Lords of Council—actually here enforced; in the usual way, by the King's Officer, is directly in view. It is fairly and properly described—there is an exact coincidence both in time, and in the acts, while none other can be condescended upon. And hence, so far from objecting to the contract, to that very deed whereby the Haldanes are instructed to be the eldest co-heirs, and the Napiers the youngest, the latter, unlike their present descendant, are eager to obey and implement it; thus excluding any doubt that could be entertained as to its validity, although unnaturally crushing his argument. Combining these facts with the procedure before the Lords of Council and Session, in 1562, where the contract, stamped by the authority of the Court

monition of an honourable man, William Edmonstone of Dunreath, and Stewart of Menteith, by his Letters Patent." What is actually past is evidently made future in the previous passage, and some words appear in it that are not to be found in the original.

¹ *Compromissio* is virtually in its literal meaning synonymous with contract. Such was also its technical one. Du Cange, renders it by *Pactum*—the very first interpretation of which, given by Ainsworth, is *contract*.

long before, was transferred, *by consent of parties*, to the existing representatives, it is impossible to conceive any thing stronger than the argument that now arises in favour of the Haldanes. It is very true that the operation of the deed was suspended,—but that was not owing to its inefficacy—but to informalities in the commission, and Haldane maintaining his exclusive right and control over the principal messuages, *without inspection* to the Napiers—subjects rather of an alien description, which rendered the allotment of the property nugatory at the time. Such was the scope and import of the protest. The dispute in the last instance, if not a scheme of protraction, may naturally have been occasioned by the Napiers founding upon the *Regiam*, and there being no special clause in the contract barring the recompense, while Haldane may have argued upon this very silence; and possibly some dawns of the new law that may have begun to appear.

The author may here mention, that he had taken a copy of the substance of the protest from the original, several years ago, when it was shewn him, with a few other papers, by Mr. Napier, but its precise import had escaped both, and it was only upon re-examination, elicited by Mr. Napier's arguments, that he discovered the results that are mentioned. If the learned gentleman had not adduced the authority, the present writer would have been rather reluctant to have founded upon his copy, but

as it is otherwise, and the former is most open to conviction¹—while we cannot apply to him at present, it has been deemed advisable to bring it into the controversy. Of course, Mr. Napier is ever welcome to act in the same way, in reference to his opponent.

It is very plain, that the allusion in the instrument to the contract and decret would have been nothing, had it not been for the discovery of that important transaction, which has an extensive and varied influence in the case, and not only is itself decisive, but the master-key to other arguments. The Rusky co-heirs had thus been at variance with each other in reference to *minutiæ*, respecting the partition, but evidently upon no ground that can assist Mr. Napier. Things, probably, in part remained unsettled ; and we hence see a cogent reason for the action of transference in 1564, to enable the respective representatives fully to implement it,—a very natural step it is thought, although the latter rather feelingly views it as “ a ridiculous and *useless* process.”

P. 135.

The case in support of the Haldanes is now conceived to be so strong, that it is perhaps unnecessary

¹ “ If the Author of the Tracts, (he says) or any other Antiquary of equal zeal and information, shall completely refute this history, the Author of the Memoirs of Merchiston will most cheerfully confess the error of that genealogical scheme, showing the Philosopher's representation of Duncan VII., Earl of Lennox,” &c. p. 162.

to allude to a direct legal presumption in their favor, from their possessing the ancient title-deeds of Rusky; those anterior to the descent of the property to the co-heiresses, independently of what concerned their own portion. This, in part, will be afterwards shewn, and indeed can be fully instructed. It is fixed in law, that in a case like the present, the former go exclusively to the eldest co-heir. Erskine, referring to authorities, says, "As the title-deeds of an estate cannot be in the custody of two different persons, the *eldest* sister is preferred to the keeping of them;"¹ a plain and unavoidable consequence; and on the 7th of July 1680, the Court of Session, adhering, as Lord Fountainhall shews, to the ancient law, decided that "where there were two heirs-portioners, the child or *descendant* of the *eldest daughter* ought to have the custody of the papers and writs."² We have here an instance identical with the Rusky succession. This additional circumstance, therefore, is important, and rounds and completes the evidence under this head, which may be now held *probatio probata*, exclusive of any opposite argument—certainly only of an equivocal kind; while it even will be further corroborated by irresistible evidence in the sequel.

After mature consideration, and repeatedly sifting and balancing the merits of the controversy, the writer must confess that he can arrive at no other

¹ Book iii. tit. viii. § 13. *Heirs Portioners*.

² *Decis.* Vol. I. p. 107.

conclusion than the one he has formed, however different it may be, as he shewed in a late publication, from what he originally entertained. Indeed he much fears that he all along has been trifling with the public, and fatiguing them by proving a truism. Mr. Napier thinks he has discovered invincible arguments in the grant of the *maritagium* of Elizabeth Menteith, and the retour of her sister Agnes, but whatever he may be led to imagine, they will be found upon inquiry, to be of an evanescent quality.

The precise time when Elizabeth Menteith became major is not known, but there is a royal grant of her *maritagium* in common form, on the 26th of March 1455, to John Napier apparent of Merchiston. Every antiquary knows the import of such a grant—it merely enabled the grantee to exact a sum or casualty from the lady in the event of her marrying, and if she did not marry the person he was authorized to offer, he was entitled to a second fine, or payment that was called the double avail. Sometimes the grantee offered himself, and sometimes another, but matrimony did not always follow, and the lady was at liberty to refuse in both cases—though subject thereby to the penalty that has been noticed.

In these circumstances, Mr. Napier concludes because John —, at some unknown period—adopted the first of these steps and was successful, that Elizabeth was of age, and marriageable about the date

P. 163-4.

of the deed, nay actually then married. These certainly are loose and irrelevant conclusions. It by no means follows because the *maritagium* was conferred by the king at a certain moment, that the casualty was then due, or the lady marriageable; it might equally have been prospective, and referrible only to a future period. This circumstance is self-evident in our records, which exhibit numerous instances of grants of *maritagium* expressed in the same way in the cases of minors, pupils, nay, even *embryos*¹—to whom Mr. Napier's argument might fairly apply, but with what success need not be illustrated. The grant of Elizabeth's *maritagium*, therefore—while neither explicit, or throwing light upon her age—cannot authorize the inferences that are drawn. Nothing was more uncertain than the passing of the *maritagium*; it was bestowed at no stated period of the ward—often long before the profits

¹ George Earl of Huntly, obtained in 1535, a grant of the marriage of John, son, and heir of "umquhile Alexander gordon fiar of Sutherland." John was then a pupil, and was not served heir to his father until 1546.

Reg. Sec.
Sig. Lib. X.
Retour
Sutherland
Case, p. 4.

On the 28th of August 1526, there is a grant by the Crown to George Ker, brother of "umquhile Andro Ker of Cessford," of "ye meriage" of Walter Ker, his son and heir. Walter was not served heir to his father until the 12th of May 1528, and besides, failing Walter, George, in the above grant, is to have "ye meriage of ye air, or aeris male quhatsumevir yat sal happen to succede to him in his heritage." Many other such instances might be given; and one will be immediately added.

Reg. Sec.
Sig. Lib.
VI.
Retour
Roxburghe
Charter
Chest.

became due, and was subservient to interested motives, and the whim and caprice of the superior.

P. 153. Mr. Napier seeks to prop this frail attempt, by asserting, without a tittle of evidence, that a marriage took place between them, (*John and Elizabeth*,) about the time. This is denied; there is no proof of the fact until several years after, which leads to the opposite conclusion, and clearly that she was then minor. He also urges, as instructive of the same thing, "that there is no gift of the ward to John (in the above grant,) which, according to the practice in such gifts, would have been joined with the *maritagium* had this been *merely a pecuniary benefit* granted out of the estate of a child." There is a strange misapprehension in this passage, the *maritagium* in every case was alike, whether granted alone, or with the ward, and of the nature already described. It never conveyed the right to the donee to contract marriage with the vassal—such a thing is ideal—the option lying with the latter; and as to there being no instances of grants of the *maritagium* alone,—including the pecuniary benefit,—the invariable attendant, (as seems to be inculcated,) that is refuted below.¹ It actually did happen in

Ibid.

Act. Dom. Hay of Smithfield, having a grant of the marriage of Elizabeth
 Con. et Baird under the Privy Seal, offered certain parties to her in
 Sess. Lib. matrimony, protesting that, if she refused, he might have the
 14. double avail—while it is proved by the record that she was not

¹ It appears by a judicial proceeding in 1540, that Mr. John

minors and children, &c. It is quite an anomaly; therefore, in Mr. Napier to affirm, that "there can be little doubt that the gift of *maritagium* was just a *part of the marriage settlements*"—a mere hallucination, which, in his emergency, he is obliged to adopt, to bear him out in his untenable argument. That the sovereign could legally control, or enforce the nuptials of a party, as is here inferred, is adverse to the common principle in our practice, that *Matrimonia debent esse libera*, and would be a piece of tyranny, to which we even did not approach in the most arbitrary and turbulent periods of our history. P. 154.

But it seems that Agnes Menteith was of age on the 11th of February 1455,¹ and served to her por-

in the thralldom of John, but "our soverane lordis frie liege woman—an pure damisel, and hes bene lang time in our soverane lordis warde." The Crown had therefore retained her ward, as it probably did in the case of Elizabeth Menteith; and although the former had only a grant of her marriage, it made no difference, for he still exacted the pecuniary benefit or avail. It may be here observed, that individuals were occasionally called upon in this manner to marry during their minority, as can be easily proved.

In 1524 the Crown grants simply his *maritagium* to Thomas Hamilton, apparent of Bathgate, and failing of him "*their marriages—til his airis quhatsumevir*"—thus comprising, as in a former instance, infants and embryos, and excluding the unavoidable inference of instant matrimony. Reg. Sec. Sig. Lib. 14.

For a few more notices of this curious casualty—see Appendix No. I.

¹ Admitting Mr. Napier's statement and inference—see his work, pp. 159, 160 The year, it may be observed, began then on the 25th of March.

tion of Rusky on the 28th of April in the same year, while, although the precise period be not fixed, it is proved by an Exchequer Roll, that Elizabeth her sister had been infeft in her half, and paid the relief duty sometime between the 26th of July 1454, and the first of October 1456, which instructs the same thing as to the former. And the scope of Mr. Napier's argument now is—that supposing his friend Elizabeth not to have been infeft till the last date, and on the theory of her being the youngest co-heiress, this preposterous consequence must hold, that there would only be the difference of little more than eight months between the ages of the sisters—and there obviously might be less. To avoid it, therefore, Elizabeth must be put over Agnes. But, even favouring Mr. Napier's argument much more, and giving him the eight months, and the excess to the bargain, it would merely follow, as he himself remarks, that they were twins, which would be tantamount to a defeat on his part, because, from the irresistible evidence that has been stated, Agnes must have been the eldest twin, which would leave matters as they were.

It is apprehended, however, if the learned Gentleman had duly sifted our original law and practice, he would have found a quick solution to this imagined anomaly, and in perfect keeping with the author's argument. Erskine, whom he has referred to, after inculcating that, in the ordinary case, the ward lasted “in females” until fourteen, makes this

exception, that “*in co-heiresses (in the case of such,) the ward determined* when the ELDEST attained the age of fourteen, for as the right of superiority, (he adds,) was a *jus individuum* belonging solely to the eldest, the casualties due by two or more, ought also to be regulated by the age of the eldest. Besides, that heirs-portioners were heirs *pro indiviso*, each of them had a property in every *gleba terræ*; and, therefore, when the eldest came to be fourteen, the superior had a vassal fit for marriage, who was truly vassal in every inch of ground in the ward fee. The ward determined, also, in male heirs, before their age of twenty-one, if they committed treason.”¹

In illustration of the fact mentioned of the co-heirs succeeding *pro indiviso*, it may be remarked, that Agnes, in her retour, is not served in the half of Rusky, but generally, according to later practice, in the lands too, as if she had been the sole heiress, which is consistent with the notion, that by the majority and entry of one co-heiress, the whole fief was taken out of the hands of the superior. The above principle seems analogous to that in the English law in the case of co-parceners, “that the entry of one of them, shall, in cases, *enure as the entry of them all*.”² Hence, if the ward, thus determined by the accession of the eldest co-heiress, none of the

¹ Book ii. Inst. v. § 9.

² Blackstone, Vol. ii. p. 188.

others could continue in the thralldom of the superior, or be excluded from the inheritance, but all would enter with her,—and such being the case, the circumstance alone of the entry, or investiture of one is immaterial, and can throw no light upon the question of their ages. Whether there may have been a dispensation, or some such form, on similar occasions, we need not inquire,¹ the result being in the way stated. The application of this to the present case is self-evident. Agnes Menteith was re-toured on the 28th of April 1456, and infest on the 5th of May thereafter, and hence, by her entry, the succession would be propelled, if we may use the term, to her sister Elizabeth, though a minor; who thus attained a constructive majority in the eye of the law, and came to be *in pari casu* with her. This is, indeed, corroborated by the exact *juxta* position of the charges of their respective entry, or relief duties in the Royal accounts²—and not at intervening spaces, as otherwise would have happened—shewing that they entered *semel et simul*.

There is, therefore, no room for holding the sisters to be twins, or treading too closely upon each other

¹ Out of the mere necessity of the thing, dispensations, which were often granted in the case of services, would be particularly expedient to exclude the great inconveniences arising from the *pro indiviso* co-heirs, succeeding piece-meal and confusedly at different times; nay under the irresistible evidence in favour of Agnese's seniority, the adoption of such a form, in her case, might fall to be presumed, independent of other considerations.

² Proved by the Exchequer Roll referred to.

in point of age, thus at once removing the supposed incongruity from the neutral circumstances founded upon, that alone countenance Mr. Napier's inference. As little does the payment of the entry duties, at the above period, demonstrate Elizabeth's majority, as the learned Gentleman supposes. He maintains, upon the authority of the *Regiam*, which was far from being always a rule, that as "ane heretrice," ^{P. 152, et seq.} who married after majority, exclusively paid the relief,¹ Elizabeth, from her payment previous to 1456, was in a parallel situation—which would only, at the most, reintroduce the *twin* theory.

But both Elizabeth and Agnes, as will be perceived from the Exchequer rolls, do not appear to have been married in that year—while the above law is simply in the ordinary case, without reference to the specialty that has been noticed. That the nuptials, moreover, must have followed after majority to end the ward and constitute the relief-duty, as the *Regiam* would seem to inculcate, is not consonant with practice. Additional instances can be shewn of unmarried heiresses also paying the casualty. Thus, the four maiden co-heiresses of Airth are infeft, and pay the relief-duty for the lands of Glorat, at the term between the 10th of July 1454, and the 17th of July 1455;² and Elizabeth Fenton, as will afterwards be seen, though unmarried, was entered, and paid the relief-duty in 1523,

¹ Lib. ii. c. 70.

² Exchequer Roll for that period.

when she alone pursues an action, relative to the casualty, against the superior. But it is needless to dwell upon a point so obvious in law. However the notion of the *Regiam* may have held in the earliest, and most austere ages of feudalism, no such restriction continued at the period in question, or is admitted or discussed by our Institutional writers. Nay, the principle anciently held was quite different, as we learn from the *Quoniam Attachamenta*, which says, if a vassal would not marry, “*non compellatur ad hoc facere*,” but when he comes of age he shall merely pay the superior the ordinary avail, because “*matrimonia debent esse libera*.”¹

There can be little doubt that some of the previous co-heiresses of Glorat were minors at the time, confirming what has been premised; and if our retours are explored, there will be found a remarkable elucidation of the doctrine and practice in their case. We seldom meet, anciently, with the service of a single female co-heiress, but, on the contrary, they present themselves in clusters, sometimes even of seven, or eleven, under their maiden appellations, and all serving and taking up the succession together.

An instance, in point, may be here quoted, at the beginning of the 17th century.

In the month of February 1617, Adam French of Thornydikes died without issue, leaving three sisters, Jean, Alison, and Margaret, his heirs-at-law, who

¹ C. 98.

became co-parceners of his estate, which held of the crown. At this period they were minors, and had a requisition from the donator of their marriages to marry, as is proved by a subsequent litigation, reported by Durie, where it was found that the act was effectual, although without citation of their tutors and curators.¹ On the 20th of May 1617, Jean French was served eldest co-parcener in Thornydikes,—it is obvious that her two younger sisters, at least one of them, could not then have been of age, but this made no difference, for both Alison and Margaret were served also, (though without the *precipuum* of course,) in the same manner, and upon the same day, as if of lawful age, without the intervention of a dispensation.”²

It might even be a speculation whether the entry of the eldest co-heiress, it being *pro indiviso*—and from the principle noticed—might not in a barbarous age supersede that of her sister, a *minor*,—which is a material consideration, because, while Agnes Menteith’s retour is extant, not a trace can

¹ Lord Durie, after stating the object of the action, which was “for declaring of the marriage of *the heirs* of L. Thorndykes pursued at the instance of Frenchland,” who had “the gift of the marriages,” adds that the “Lords found that this, and the like requisitions, being made to *persons minors*, needed not to be made to their tutors and curators; but found this sufficient, being made to the *minors themselves*, because the consent of tutors and curators is not requisite to the minor’s marriage.”

² For the other facts see above report, dated July 3, 1622, and retours noticed. Inq. Spec. Berwick, No. 107.

be found of her sister Elizabeth's. Anciently, too, the right exclusively centered in the eldest co-heiress of doing homage to the king for all the heritage partible among the co-heirs; and such being the fact, the feudal entry of Agnes, upon this principle of abstract ministration through the eldest, might have operated in an analogous way in the previous case.

The paternal regards of the comptroller, Alexander Napier, father of John, being naturally riveted to Elizabeth Menteith, through the interest in his son, may explain the casual insertion of her name before Agnes, in the entries about the relief-duties in the royal accounts, which were directly under his eye. At the most, indeed, the circumstance is of little weight, when we observe the slovenliness and laxity of our documents in these respects. In 1593 there is a renunciation by "us Jane, *Margaret*, and *Anna* Colquhones lauchful dochters to umquhile Schir Umphra Colquhoun, knicht" pupils, with consent of their tutor, as heirs to their father, in favour of the heir-male.¹ Now, Mr. Napier would say that Margaret was elder than Anna, being mentioned first, on an important occasion, when the lineal representation of the Colquhouns was in question, in which she had a direct interest. But this, by his own argument, is not so clear, because, on the 18th of May 1638—

¹ Records of Bonds and Obligations, Vol. 46.

the case of Jane having predeceased without issue—

“*Anna* et *Margareta Colquhouns*” are served heirs to their father, the precedence being given to *Anna*.¹

On the 16th of April 1595, *Janet* and *Margaret Hamiltons* are respectively served heirs in special to the lands of Saint John’s Chapel, by two separate retours, and in the record, *Janet’s* is first inserted.^{12.}
 The learned Gentleman would again urge that the seniority here is unquestionably observed, and that the author must take another trip to Oxford, by way of penance, for doubting the fact. But, unfortunately for this agreeable prospect, *Margaret*, who afterwards married *Robert Home* of *Carolside*, is designed in a process before the Court of Session in 1613, “*eldest* lauchful dochter, and aire portioner of her father.”² In the same way, in an action in the Court of Session in 1543, where *Patrick Hepburn*, Master of *Hailes*, is pursuer, and *Margaret* and *Janet Haliburtons*, two of the co-heiresses of *Dirleton*, defenders, *Margaret’s* name is inserted before *Janet’s*;³ but in a previous litigation, before the same Court, in 1523, *Janet* is explicitly termed “*elder* sister and aire” of *Dirleton*, while additionally proved by the context to be the eldest representative.⁴

Such was our exactness and regularity in these

¹ Inq. Gen. No. 1655.

² Act Dom. Con. et Sess. Vol. 216.

³ Act. Dom. Con. et Sess. Vol. for 1542—3.

⁴ Act. Dom. Con. Vol. 33.

Inq. Spec.
Berwick,
Nos. 511-
12.

See p. 216.

matters—but at any rate the argument of “*sequence*,” as Mr. Napier calls it, is fairly met by the postponement repeatedly of the Napiers to the Haldanes, in the contract in 1485, and relative proceedings, when the last have always the *pas*, and this was at junctures when the fact of the seniority was most important, and went deeply into the merits of the transaction.

We now come to Mr. Napier's only remaining argument—the supposed possession of the *principal* chemise or messuage by the Napiers,—and the author may here admit, after the deep attention he has latterly bestowed upon the case, that circumstances have transpired to alter the views he had previously entertained. So it is with the muddy and perplexed streams of antiquity, different from the clear pellucid current that guides a writer in the discussion of modern facts, and the advice of Gavin Douglas is not more appropriate to critics in poetry, than it may be, with a little variation, to Scottish Antiquaries.¹

After a careful perusal of the evidence Mr. Napier here adduces, it will be found to prove nothing more, than that the Napiers possessed their individual half of Rusky with corresponding messuages, and eventually, though not in the first instance, “manors”—*i. e.* the sites of these messuages with

¹ “*Consider it warlike, rede astiner than anis,
Weil at ane blink slie poetry not tane is.*”

their pendicles, &c. (the latter term being with us of very limited meaning)—as naturally might be expected from the conversion of what originally were secondary sites, or steadings, into better receptacles,—these serving as a *nucleus* to manors.

“*Messuage*” (*alone*) not a term of fixed import, denotes a house of any kind, but most commonly a secondary or inferior one, which is different with *manerium*. Such it is believed must be held to be the legal interpretation of the passages Mr. Napier quotes from the Merchiston Charters, carrying the *half* of Rusky with messuages, and manors indifferently, which, considering the general mode of the description of the rights of co-heirs, and in the circumstances of the case, can imply no more. It is, besides, an ordinary principle in law, and must weigh here, that general words following a specification of particulars, fall to be controlled by them. But the striking fact, so different from all cases of possession of the principal half of the fief, and further authorizing the conclusion, is—*that in no instance are the Napiers instructed to have held the “principal,” or “capital” messuage, or “heid-hous,” — or even, explicitly, the “messuage of Rusky.”* He exultingly founds upon the first title of the Napier portion of Rusky and Lanerky in Pa. 141-2. 1507, in the person of Archibald Napier (upon the resignation of his mother the co-heiress,) conveying the *half* of the property “*cum mansionibus omnium dictarum terrarum,*” terms merely to be construed Pa. 139-40.

in the way stated,—but the learned gentleman, al-
 P. 139-40. though he here blames his opponent for not bring-
 ing out, as he fancies, the value of the evidence for
 Merchiston, has not given us the full substance him-
 self—and it contains a clause not alluded to by him,
 of the last importance in the controversy. Every
 P. 143. one knows, as indeed he partly shews, that infest-
 ment was always taken at the messuage of an estate,¹
 which act necessarily establishes what was held to
 be so,—and by the clause in question it is pro-
 vided that “ *unica saisina capienda per dictum*
Archibaldum et heredes suos apud LE BORDLAND
DE RUSKY, VEL apud dictas terras de LANNER-
KYNNIS, (Lanerky,) seu aliquam partem earundem,
erit saisina sufficiens pro omnibus terris predictis !”²

We therefore now see what were truly the Na-
 pier messuages. They consisted of the inferior one
 of *the Bordland* of Rusky—an old acquaintance,
 and some such other site, *quite indeterminate*, and
 not of the messuage of Rusky, or principal mes-

¹ An authority for this, though almost unnecessary, shall be
 here given. Bankton inculcates that heirs-portioners and “their
 heirs, must be severally infest in *their own lands*, and *not at the*
mansion-house, which falls to the eldest, though that was perhaps
 the place mentioned in the charter of erection for taking seisin
 for the whole lands.” Vol. ii. p. 348.

In the case of co-heiresses, when the property was held *pro in-*
diviso, all were infest at the principal messuage, but not so after
 a partition had been effected, as by the contract in 1485, when
 seisin was respectively taken in the way stated.

² Reg. Mag. Sig. Lib. 14, No. 429.

suage of the whole fief. He is here confuted too in the supposed contrast he draws between the Napier and Haldane messuages, contending that the former were determinate, while the latter required to be created; which remark, however, alone applies to the Napiers at this early period, and shews, while it disproves their possession of the ancient messuages, that theirs were only then in embryo. But it moreover will not escape attention how exactly the above clause tallies with the contract or partition of Rusky in 1485, which, if genuine, would be its sure warrant and authority, whereby it is fixed “yat ye said Johne naper and *Elizabet* (the previous lady,^{See above p. 4.} are) to cheise uyir tua chimmeisse *quheir it plesit yame* wytin ye *samin landis*, (*Rusky* and *Lanerky*.) and to tak YE BORDLAND OF RUSKY for yer *chim-meis* gif yai pleise.”

The above circumstances, therefore, are of themselves decisive of the case,—they not only control and explain the meanings of *messuagium* and *manerium* in the Napier titles—but, what is equally material, additionally corroborate, and authenticate the contract in 1485, which Mr. Napier groundlessly impugns, although it is again proved to have been directly recognized by one of the parties—the very co-heiress whose rights the learned gentleman affirms it subverts, as well as by her son,—besides being a clear rule, and acted upon.

The Napiers also resided at Barnisdale, on an inferior part of the property, where the same

lady and her son were at pains to build a new manor-place and house, to which they gave an appellation,¹ little conceivable, if they had owned, besides the Bordland, the principal messuage; and there is not a particle of proof that they ever held, or laid claim to it,—their messuages only consisting of those that have been mentioned.

Having stated so much in reference to the Napiers, we now come to consider the case of the Haldanes, which presents a striking contrast to the former. It is proved by the contract in 1485, that the Haldanes were to have as the "*first chimmeis of Rusky*," "ye *place* wytin ye loche of Rusky." The dimensions and extent of this "*place*," or manor place as it assuredly was, owing to being within an islet, must have been very limited, probably comprising little more than the site of the chief messuage and out-buildings, which may easily account for its being used to denote the chief messuage, a meaning too occasionally given to the term. Next, as has been proved by the subsequent protest in the same year, the Haldanes were entitled to the "*mansiones principales le chemises de Rusky, et lanerky*," thus confirming the assertion, which will be immediately farther instructed. The Haldane char-

¹ "Cum manerio et messuagio infra dictas terras de Thom, nunc vocat. Barnysdale per dictum Archibaldum et matrem suam de novo edificat." This clause occurs in a Napier Charter in 1509, and downwards. See Mr. Napier's work, p. 143-4.

ter in 1508 carries the half of Rusky, "*cum manerio*,"¹ which is clearly descriptive of Manor Place; but in case the expression be thought too general, as it may be, and not referring to the site of Rusky, it is to be added that the Charter also ordains that the "*manerium de Rusky*" shall be the "*principale messuagium*" of the property, in perfect coincidence with the contract. As if, however, to exclude all doubts upon this head, it is, moreover, proved by the infestment that followed, that seisin was taken "*apud CAPITALE messuagium, et manerium de RUSKY*,"² messuagium being placed first, and the words fixing that it was upon the *very* spot within the place comprizing the principal messuage of Rusky, and at the latter itself, that the act occurred. These, indeed, are most satisfactory notices, "*capitale*," and "*Rusky*" being here used, which they never are in the preceding case; and as infestment is taken at the chief messuage—that, from what was shewn, must have belonged to the Haldanes. The contrast indeed between the Napiers and Haldanes in these respects is most striking, happening at the same time. In 1507 the former were only to be infest at the Bordland, or some nameless spot; in 1508 the Haldanes were actually infest at the principal messuage; besides holding the buildings at Lanerky, &c. Nay,

¹ Reg. Mag. Sig. Lib. 15, No. 79. It is dated 20th of January.

² Dated 26th of March thereafter, Haldane Charter Chest.

to determine the import of the preceding words, it is only necessary to examine the Napier titles in reference to their barony of Gartness.

In a charter of the property to them, dated 12th of June 1512, it is ordained that “*manerium*, sive *locus* HABITATIONIS de Gartness, erit CAPITALE MESSUAGIUM” of the lands,¹ and that infeftment shall be taken “apud *capitale messuagium de Gartness*,” which shews that manerium was properly, with us, the spot upon which the chief mansion was built—or manor place—including the yards and offices, &c, of course necessary to the habitation, and hence, with a natural degree of latitude, used as it here is, synonymously with chief messuage.² Again, as we have seen, “manerium et messuagium” are employed in the same way in reference to Barnisdale in 1509, they being said to have been *rebuilt* by the Napiers, which confirms the above interpretation. And thus it turns out that the Napiers used far different language than in their

¹ Reg. Mag. Sig. Lib. 16, No 66.

² This agrees with Spelman’s interpretation, “Reperitur etiam *manerium* aliquando dictum de ipsis *ædibus dominicis* seu *domicilio* ubi *dominus hujusmodi manet*, ut cum dicimus locum aliquem esse situm manerii quo nihil vulgatius.” The above shades of meaning, with the ever varying nature of language, explain the hesitation with which the author formerly expressed himself upon the subject, and which Mr. Napier objects to him. If, perhaps, the learned gentleman had been a little more hesitating and distrustful himself, it would have fared better for his argument.

Rusky conveyances, to express the principal messuage.

The Haldane charter in 1508 is capable of further illustration, for on the 29th of July 1644, it was ratified by Parliament in favour of the existing representative, and the clause of infeftment is thus given—"ordeaneing seasing to be takine *at ye place of Rusky*, which is ye *principal heid-hous*," &c.¹ "The place of Rusky"—the very words used in the contract in 1485—and chief messuage, are here again identified, and the credit of the contract additionally vindicated.

But, independent of all this, "manor, and messuage," (or mansion, which is the same thing,) ² exclusively applied to the Haldanes—were clear technical terms to denote the preferable interest of the *eldest* heir-portioner in the fief. They were not only so employed at the beginning of the fifteenth century, but had this very effect as far down as 1617. On the 20th of May, in that year, Jean French, formerly alluded to, by a special service in the lands of Thornydikes, which held ward of the Crown, was found to be the *eldest* daughter and heir-portioner of Robert French of Thornydikes, her father, and *upon this ground*, to have right *inter alia* to "*Manerium et mansionem de Thornydikes*."³

¹ Original volume of the missing Acts of the Scottish Parliament, General Register House, lately recovered from the State Paper Office.

² Including the title of the fief.

³ "Et quod dicta Jeanna french est natu maxima trium fili-

.. We discover here, too, what foundation there is for Mr. Napier's assertion, that by a retour like this, an heir could not have his right instructed to the chief mansion-house, and that it "could only be made effectual under pleadable briefs of division," and by a citation of other parties. It may be also asked, what is the consequence of the Haldanes being thus infeft, as they certainly were, in the chief messuage of Rusky? Why no less, it would appear, than to vest in them the representation of Rusky—and nearly so of Lennox—to which the earldom or the honours were attached; for Mr. Napier says, that the mode of taking up a title in Scotland, was by feudal investiture in the principal portion of the part of the fief, including the chief mansion, or messuage.

It is therefore abundantly evident how the case here stands, and that the learned gentleman has been very unhappy in his rash assertions, "that the fact is *unquestionably proved*, even by the evidence produced by Gleneagles, that Elizabeth Menteith and her lineal successors *for many generations, possessed the principal messuage, or mansions of the Rusky estates, to the exclusion of her sister Agnes and her descendants,*" while he reflects upon the author for entertaining the opposite idea, and not observing

arum, &c. quondam Roberti frenche sui patris, &c. et quod dicta Jeanna *jus et titulum habet in integrum manerium et mansionem de Thornediikes.*" Inq. Spec. Berwick, No. 107.

things, as he fancies, essential to his argument,—but which directly refute it. With as little success he urges that he is not “aware that any charter of the family of Gleneagles, relative to these estates, can be produced, in which any mention is made of the messuages or manors of Rusky.” The P. 143. only difficulty in the point, it is apprehended, originated in the somewhat flexible meaning of *Messuagium*, with the unobserved acceptance of “place,” or manerium, particularly in the investiture in 1508, which vanishes, however, before what is now adduced.

Carpentier explains *Manerium* exactly as stated —“*Habitatio cum certa agri portione*,” and although in England, the term had ordinarily a much more extensive meaning, yet Spelman, while he applies it “*ædibus dominicis*,” renders it “*Baronis sedes tam minoris quam maioris, infra quam Baro iste, seu manerii dominus suis colonis, et vassallis (tenentes vocamus) jura reddit prædalia.*”¹ Now, this description precisely corresponds with the situation of the family of Haldane, and their feudal rights in reference to Rusky—who, while the Napiers had their portion erected into a nameless “*tennandry*,”—by the charter of 1507, ordaining infestment to be taken at “*the Bordland*”—were actually BARONS of “*Rusky and Lanerky*,” the correspond-

¹ Under *Manerium*.

ing title being inherent in their half. This is proved by a judicial proceeding before the Supreme Court, in 1555, in a question between John Halden of Gleneagles, and the Sheriff of Perth, as to the entry or relief-duty of the Barony.¹

The Haldanes were, in this manner, Lords paramount of the fief, and necessarily doing homage exclusively for it to the King—leading the men of the district—and dispensing the *jura prædalia*—

Act. Dom.
Con. et
Sess. 13.
Dec. 1555,
Vol. 12.

¹ “ Lettres purchest at ye instance of Johne halden of Glennegas oy and air to umquhile Johne halden of Glennegas, quhe wes slane at ye feild of flowden, &c. againis patrik lord ruthven Scheriff of Perth &c. makand mention yat quhare his said umquhile gudschir deit last vestit and sesit in ye heritable fe of all and haill ye lands and BARONY of *Rusky and lanarky* wyt ye pertinentis lyand wytin ye scherifdom of perth, and continualie fra his decease—umquhile merion lawson his spous gudame to ye said John haldane now of Glennegas had conjunct-fee yerof unto his deceise quhilk wes in ye moneth of July—1553,” &c. The object of the plea was, that John should be exempted from paying the relief duty in terms of the Act of Parliament of James IV, at Twysilhault, which remitted their ward and relief to those who might fall in battle, but he was unsuccessful, owing, apparently, to the immediate succession of Marion the conjunct fiar. This lady was no other than the fair and lusty mistress of Squire Meldrum, celebrated in that characteristic poem, with the date of whose death we are thus presented. It may be here observed, that although we ordinarily hear of the lands of Rusky, &c. that does not exclude the notion of their having been, at the same time, a barony, as can be instructed by our practice; and, however separated or conjoined our fiefs were, they still retained their original character.

must have inherited the elder co-heirship, which was identified with the baronial privileges and jurisdictions. It would indeed be an anomaly, supposing the seniority to have been in the Napiers, if they were thus merely free tennants, while these exalted privileges vested in the former. Their portion of Rusky was always a secondary possession, never forming in itself a barony, or being the head court of any of their western fiefs and dependencies, which is also consonant with the notion. But we have, moreover, the authority of Sir James Stewart for the conclusion in question. That eminent lawyer says, "If a barony should descend to *Heirs Portioners*, it may be thought that all of them will have right to the power of *Baillery* (*delegated jurisdiction*,) *but the dignity of Baron should remain with the eldest.*"¹ He is here talking of baronial fiefs, not of peerages; and as the case he puts is the same with the present, while he gives the dignity and rights to the eldest co-heir, which we see was possessed by Haldane, the latter necessarily was such heir; and hence another argument arises in favour of his family, quite in unison with the former, and corroborating the general argument.

It is rather thought, that the public will be now satiated with evidence, and satisfied as to the results of the case,—but what will they think when it is inti-

¹ Answers to Dirlton, p. 148.

ated that other proof, equally conclusive, remains to be stated.

As formerly shown, the eldest co-heirship of Lennox, moves upon the same springs, and is co-identical with that of Rusky, in consequence of the descent of the latter from Margaret de Levenax, daughter of Duncan, Earl of Lennox—so that whatever illustrates the one must illustrate the other. It is instructed by a notorial instrument, dated 11th of March, 1471, that Agnes Menteith, “sponsa nobilis viri Johannis Halden de Gleneglis,” had obtained a brief from Chancery, “super terris, *superioritatibus*, annuis redditibus, et *officiis Comitalis de Levenax*,”¹ with the view of connecting herself with Earl Duncan by service, but nothing farther followed, owing, as it is conceived, to political reasons, and the opposition of the Chancellor. It may be only here remarked, that no such claim was ever tendered by Elizabeth, her sister, who, in her subsequent service, as a Lennox co-parcener, upon the 4th of November, 1473, is only retoured in “*terris et annuis redditibus*,” which is again illustrative of her juniority.²

Further still, the crown in 1473, grants to John Haldane, a portion of the Lennox, as *first and principal heir, or representative of the same*, which

¹ Haldane Charter Chest.

² Original Retour from the Napier charter chest, referred to by Mr. Napier at p. 27 of his work.

is proved by Letters of James IV. in 1475—cassing and annulling an illegal service of John Lord Darnley, the youngest Lennox, co-heir through Elizabeth, sister of Margaret de Levenax—to have been in right of his wife Agnes.¹ And while Agnes—Haldane through her, and their son James, actively prosecuted their claim to the “superiority” of Lennox—avowedly in virtue of the descent from Margaret, as heirs of Earl Duncan—*never for one moment* was such claim resisted by the Napiers, nor did they, as upon Mr. Napier’s theory they would have been exclusively entitled, ever attempt to move in the business. The conclusion of the transaction is equally material, for the Haldanes obtained by an agreement with Darnley, and his son Matthew, a

¹ It is there explicitly stated, that John Haldane “*evir clamit the said superiorite (of Lennox,) be reason of his spouse, and optenit oure favouris tharto as principal be oure charter and seisin.*” Here the very charter in 1473 is mentioned. It is also added, that no other person had claimed this right of the king but Halden and his spouse, which, as is well known, rests in the eldest co-parcener. The letters are in the Haldane charter-chest. Even the grant in 1473, to Haldane *alone*, is material, as, in these days, whatever devolved upon the wife, was in the husband, and the language is regulated accordingly. In the decreet of transference in 1562, it will be perceived that both John Halden and John Napier are styled *portioners* of Rusky, (the former the eldest one,) though only in right of their wives. For illustrations of the meaning of the words “*primo et principali ejusdem*,” in the grant in 1473, which is important to the argument, as well as other relative particulars, see Appendix, No. III.

P. 73-4
and 138.

P. 76.

large grant of lands, for their right generally to the “superiority”—*to be held of the crown*,¹—while Elizabeth Menteith evidently, as the younger Lennox or Rusky co-heiress, had received in 1490, a much smaller recompense—*to be held of them only*—and merely for “*her pert* of the profyt, and commoditevis *that might fall till hir*, or till hir aeris of the superiorite, and tenandary of the fre tenandis of the said Erldome be wardis *releuis*,” &c. The same interest is also restricted still more plainly to “the *fourth part* of the tenandry” of the fief in a charter that followed in the same year, adduced by Mr. Napier. It may be observed, that as a co-heiress of Lennox, she was entitled to the fourth part of the *issues* falling to her in that capacity.

Her claim so far was easily settled—her own and her family’s preference over Darnley being but a distant consideration—while that of the Haldanes, who unwillingly acceded to his and his son’s offer,²

Reg. Mag.
Sig. Lib.
13.
No. 325.

¹ Indentures to that effect between the parties, dated 11th July 1493. Haldane charter-chest. There is a royal charter as far back as the 29th of July 1489, confirming the substance of this subsequent agreement, especially what relates to the superiority, which shews that the crown threw its power into the scale to force this—the most material transaction—which did not occur in the case of Elizabeth Menteith.

² It is a curious fact, that the agreement in 1493 is not subscribed by either Haldane or his son, but only by the Darnleys. A charter, however, in terms of it, by Matthew the son and heir of John Lord Darnley, (first of his line who assumed the title of

from their higher and more direct right, was naturally of more difficult adjustment, which accounts for the delay.

The distinction in the previous case of the superiority, is curious, and may be explained. The "superiority," i. e. *principal* one of a fief, was analogous to the chief messuage, and went to the eldest co-heir, but still he, although the right was essentially in him, and he had the proud prerogatives of administration,—no small thing in a feudal age—was obliged to equalize the accidents or profits among the younger co-heirs. An illustration in point, may be here given. Elizabeth Fenton, the proprietrix of East Fenton, in 1523, was "*enterit yerto be Jane haliburton, ye spous of — Williame Maister of Ruthven, elder sister, and ane of ye aris*" of Dirlton. On this occasion, Jane attempted to claim "ye hale relief" of Elizabeth's lands, while, on the other hand, Marion, wife of George Lord Hume, and Margaret, whose marriage is said to be granted to Andrew Ker of Fairnyhirst, the other co-parceners, and younger sisters of Janet, poulded her goods for *their part* of it. Elizabeth being in this manner distrest, notwithstanding the record bears she was ready to "pay ye samin," brought a declarator before the supreme Court, who decided that the casualty should be "*dividit equalie amangis*

Earl of Lennox,) followed on the 13th July in the same year. Haldane charter-chest.

ye saidis Jane, Marion, and Margaret, as aeris for-saidis.”¹ The relief-duty being a principal portion of the superiority (as indeed we see from the adjustment in 1490,) necessarily illustrates what the law was as to the latter, and hence the Lennox superiority, without qualification, being in Haldane, the real right, with exclusive power of administration of it, like that of Dirlton in Janet, lay in him; while *part* of the *issues* and *profits* only being due to Elizabeth Menteach, she was in the same situation with Marion and Margaret Haliburton, and hence the younger co-heiress.

In this action, it may be observed, that Elizabeth Fenton pursues in *propria persona*, as “sister and heir of umquhile Jhone fenton of that ilk,” without tutors or curators, or mention of any husband for his interest, which is always the form when a party is married. She therefore was clearly unmarried; and there being no question of her right to pay the relief duty—the person or persons to whom it was to be paid, being the only point mooted—we have a full contradiction of the strange notion Mr. Napier is inclined to entertain, that it was only after her nuptials that an heiress could pay the casualty. Andrew Ker of Fairnyhirst is stated to have had the *marriage* of Margaret Haliburton. Mr. Napier would, upon this, contend that

P. 152-4.

¹ Act. Dom. Con. 26 February 1523, Vol. 39.

the right was equivalent to their marriage settle- See p. 152-4.
 ments, but no such thing, for she did not become
 his spouse, being afterwards married to George Ker Act. Dom.
 of Faddonside, as can be fully proved. Con. Vol. 33.

After the account thus given of the final settle-
 ments between Darnley, and the Napiers, and Hal-
 danes in 1490, and 1493, we may determine what
 justice there is in the remark of Mr. Napier, that
 the last one "forms a *perfect pendant*" to the former P. 90.
 —so far from this, they were palpably different in
 several respects.

It would be needless now to sum up the argu-
 ment, for the summation would be entirely in
 favour of the Haldanes, without there being a single
 item of deduction for the Napiers. Their learned
 friend has adduced nothing that can assist them—
 indeed he has done the contrary,—and his case may
 be said to rest either upon irrelevant argument, or
 palpable though inadvertent misapprehension.

It may be inexpedient to canvass Mr. Napier's
 observations, as to whether a claim to the Lennox
 honours is foreclosed by the above transactions in
 1490 and 1493, between Darnley and his son, and
 the co-heirs, as unfortunately admitting, what has
 been proved, this is *jus tertii* to his family.

It is apprehended, however, that if the strict
 feudal principle is to be the rule, the dignity must
 be held to have gone from the eldest Lennox co-
 heir, not only from the acquisition by the Darnleys
 of the principal superiority, identified with it in

feudal times, but the long possession by them or their successors, under the sanction and authority of the crown, backed in modern times by repeated expiries of the terms of prescription. The earldom merged in the latter, in the person of James VI., but it was afterwards disjoined, and conferred upon a younger branch of Darnley, from whom the fief came by onerous transactions to the Ducal house of Montrose, in whom it still vests. And as our law, in such cases, only attends to the infestments without looking further, and as these are without any qualification, but simply confined to the act of giving possession, they are now absolute, and must render the title to the fief unexceptionable.

Whatever defects there may have been in the first Darnley service in 1473, which was recalled by the crown, and not even adopted by the Darnleys themselves,—or in the charter of the earldom of Lennox in 1490, to John Lord Darnley, and Matthew his son, they may have been partly obviated by a subsequent service in 1507, of Earl Mathew to Earl Duncan, with the precise nature of which we are unacquainted.¹ But there was especially an

¹ The circumstance transpires from the following entry in the Act. Dom. Acts and Decrees of the Supreme Civil Courts in 1507, “ In
Con. Lib. presens of ye lordis of Counsale comperit Peter Culquhoun, and
19. swere to ye Commissione direct to him to *execute ye brevis impetrat be Mathow erle of Lennox*, be ye deceise of umquhile erle of *levenax*.” This, at least, proves that brieves had been lawfully taken out by the Earl for the service.

ample novodamus in 1511 of the Earldom of Lennox in favour of Earl Matthew—including the patronages, vassalages, office of sheriff of Dumbarton, &c. so far as was in the power of the crown, who relinquished all right, or claim on their part to the rents, property, or “superiority”—“*quæ nunc possidet*” (*Earl Matthew*)—whether by recognition, forfeiture, “*seu quocunque alio titulo,—cum supplemento omnium defectuum—et in corroborationem, satisfactionem, et amplificationem juris sui.*”¹ Infestment followed upon this, and other grants—and the supposed absence of a resignation or proper conveyance by the Haldanes, however weighty, cannot meet the formidable title thus made up, which, whatever was its original nature, to use an English legal expression, may have “*enured*” to an indefeasible one.

These remarks proceed upon following out the territorial or feudal doctrine to the last. It is very difficult to fix, by a just criterion, when it legally may be held to have ended in peerages. Like customs, and laws in general, the alteration has been gradual—even more so than in other matters, and there are certain strong indications of it at the accession of James VI., and even later. But, be this as it may, it may be presumed, even upon modern principle, without reference to the former—from

¹ Reg. Mag. Sig. Lib. 16, No. 3, proceeding upon the resignation of the disponent.

the long possession of the dignity by the Darnleys—undisputed since 1493, and certainly authorized by the crown,—backed withall by the defalcation of record—that there were other transactions of a more unexceptionable kind, between the parties that may have homologated those in 1490, and 1493. Indeed, the service of Earl Matthew in 1507, which is a new and original piece of evidence, may have been connected with such an object—one most natural indeed, and likely to be embraced; and it is well known that a resignation or conveyance of a Peerage right, even in favour of a stranger, provided it had the royal sanction, was effectual with us down to the Union.

Such considerations in fact have been thought relevant and acted upon, in Peerage cases—while added to them, there is the merger of the earldom in the Crown, which presents a farther bar in the way of the ancient heirs.

Ps. 128-9. Mr. Napier, while he fancies that the author has an undue bias towards the Haldanes, affects to ridicule the phrase to “render justice to them,”¹ which is used as expressive of the motive that led him to adduce the important decree of the Court of Session in 1562—but which he thinks *odd*. It is yet apprehended to be proper—having formerly questioned in a publication,² the Haldane seniority,

Ps. 122-
134.9-40.

¹ See Tracts Legal and Historical, p. 104.

² Reply to the Mis-Statements of Dr. Hamilton of Bardowie, Appendix, No. I.

the correcting the error by new evidence, as he thus attempts, was literally doing justice to them; and he almost thinks that his respectable opponent, had he been in his place, would have acted in the same manner. The writer, besides, may assure Mr. Napier, that he is wholly unconnected with the Haldanes, or any party—he is free as the winds in this respect—and merely treats the present subject as a historical question. He would be equally happy if, by new evidence, he could reverse all his conclusions. He may further apprise him, that the true attraction to Scottish Antiquaries is the discovery of new matter, without reference to the interests of parties, most important indeed in this country, where there is such poverty of record,—Scotland being more destitute in memorials than any other. The author hopes he may always be open, in the above way, to correction, and eschew that bigotry and prejudice that too often attach to previous impressions, though erroneous, and are a bane and obstacle to just elucidation.¹

¹ In reference to the words noticed by Mr. Napier in his preface, “the above view of things and the relative evidence,” occurring in a late article of the author, it may be observed, that they were meant to express the main considerations and evidence respecting the point alluded to, stated by him to the persons mentioned, and in the previous part of the paper. It is true that the Orchardton illustration there, filling only two pages, being a subsequent discovery, was not stated to them—and possibly one or two quotations from Skene and Spelman—which seem the

History of the Partition of the Lennox, p. ix.
See Tracts Legal and Historical, p. 103.

The author will now, as he announced at the outset, advert to some other matters broached by Mr. Napier in his performances.

It is singular how often writers adhere, in a controversy, to an opinion once formed, however untenable and void of foundation. Of this there may be a striking example in the near relationship with Merchiston, assigned by him to a person styled the Warlock of Oxford, and his brother the Turkey merchant; he dilates at great length upon this topic, but with a proud defiance of solid argument, and of the rules of law that are applicable to evi-

only new facts—but they are unimportant to the material inference, which would still be the same without them. The object of the article, *inter alia*, was to correct the too decided conclusions of Mr. Napier in his Memoirs, as to the Napiers of Merchiston being eldest co-heirs of Rusky—conceived to rest, as they at least do in a great measure—upon what the author had supplied, which naturally is noticed—while, at the same time, he explained his views, which had been altered by the new evidence in 1562. It may be added, that the writer regards the whole Napier case as centering in the notice of the messuage in charters, and the “sequence” in the Exchequer Roll. Mr. Napier, on the other hand, apprehends he has a formidable argument in what he states about the *maritagium* and retour in 1455, which his opponent holds to be untenable, and if so, is justified in his opinion. In the first of these alternatives, however, there would be an *extra* circumstance, or pleading urged by Mr. Napier—although conceived to be irrelevant, and even by his own shewing not affecting the question.

dence. The learned gentleman asserts that these persons, the ancestors of the Napiers of Luton-hoo in England, were sons of an Alexander *alias Sandy* Napier, whom he makes second son of Alexander Napier of Merchiston, and next brother of Archibald of Merchiston, father of the inventor of logarithms,—but, in support of the conclusion, what proof did he adduce? Why, absolutely nothing. He referred to the *copy* of an alleged certificate in 1625, (in Hutchin's History of Dorset,) by Archibald, first Lord Napier, the son and heir of the inventor—but so far from supporting his assertion, the account disproves it, as it makes the Alexander in question, not the brother of Archibald of Merchiston, but the younger brother of his father Alexander. Mr. Napier would contend that this is a mistake, but the plea is quite gratuitous, the authority was adduced by himself, and relied upon in other matters, and if he founds upon it as to them, he cannot reject it in the above instance. By another copy too, of a similar certificate by the same nobleman in 1625, in the Blackstone Charter chest, Alexander is made brother of Sir Alexander Napier of Merchiston, and grandson of John, the husband of Elizabeth Menteith,—the same obviously with Alexander Napier of Ingliston, as is proved by records. This idea was countenanced by Francis Lord Napier, the grandfather of the present peer, no indifferent antiquary, after every investigation in his own Charter chest, and elsewhere, into the Na-

pier pedigree,¹ and is even corroborated by the previous copy in Hutchin, which, although not correct in the exact degree of propinquity, yet represents Alexander as the brother of Sir *Alexander* Napier of Merchiston. This, at first sight, is imposing, and seemingly points at Alexander of Ingliston, because the latter was the only Merchiston cadet who bore the Christian name of his brother, an incident rather unusual. But the author, to use Mr. Napier's expression, gave the *coup de grace* to this theory, because he produced legal evidence, instructing that Alexander of Ingliston died without issue, and was succeeded, as heir-at-law, by Mungo his brother.² His matrimonial alliance and history, are equally found to be different from the relative notices of the other Alexander in the above certificates, nor does he appear ever to have gone to England, as they assert, or to have formed a connection there. The fair conclusion, therefore, is, that these accounts are palpably wrong, and that if the English Napiers of Luton-hoo, are sprung from Alexander, it must be through an obscure illegitimate source.—At the sametime, the last inference cannot be established, and is met by a kind of negative evidence from his will in 1572, lately found, where he constitutes his wife, Isabel Litill, his sole

¹ He could not find evidence of the fact, but apprehended it to be so.

² See Tracts Legal and Historical, p. 135, et seq.

executrix and intromitter with his moveables, without mention of any issue.¹

The preceding remarks proceed upon the far too favourable supposition, that the certificates are genuine, and actually written by the Peer alluded to, but of this we have no surety—they are mere modern scraps of paper, unauthenticated, exclusively derived from England, and not from the sources that might be expected, and, besides, as even Mr. Napier is forced to admit, are very erroneous and contradictory. He adduces in his last work a modern copy, where the ancestor of Luton-hoo is represented as Alexander, brother of Archibald of Merchiston, but this is fairly met by the conflicting transcripts that have been mentioned, as well as by another in Collins' Baronetcy, published in 1720.² The general leaning, decidedly therefore, is on the other side. The learned gentleman makes but a weak attempt to bolster up the credit of his paper. He gives a letter from Napier of Blackstone to Sir P. 196-7.

¹ His brother Mungo is proved by records to have been heir to his landed succession, which was involved and inconsiderable. His will, dated 17th of August 1572, with the confirmation, is in the Testamentary Record of the Commissary Court of Edinburgh. He died in debt, which induced the Commissaries to remit the quot of his testament. His debts exceed the "frie geir" by about 200 pound Scots.

² Vol. II. p. 951. The object obviously here is, to disprove Mr. Napier by the same evidence he himself adduces—in other circumstances it would not be appealed to.

William Scott of Thirlestane, as late as 1712, by which we learn that he had got a copy—*still a copy*—of the account of the Luton-hoo descent from Merchiston by the first Lord Napier, from Sir Robert Napier of Puncknoll in England, which Mr. Napier says is the former. But the author has, at least, as good reason to found upon the transcript he has adduced—which also proceeds from Blackstone, and palpably contradicts it, as well as upon another in the same repository, disproving the filiation of Alexander, and, we may observe, “collected and *gathered* for Sir John Naper, and Robert Naper, Esquires, sons of William Naper of *Puncknoll*, in the county of Dorset.” Mr. Napier may ask, who was it—(“the genealogy” in question)—gathered and collected by? The answer is, by “Jacob Chaloner of the city of London, gentleman.” We learn the same thing from the copy of Hutchin in his history derived from Luton-hoo,¹ and both, as Mr. Napier would describe them, are *pendants* to Lord Napier’s alleged certificate. This is rather a strange intimation, shewing other persons had a finger in the concern, and however eminent Jacob might be at Cheapside or the Bridge—or able supplier of his ward with fish,—he must have been a poor caterer of Merchiston antiquities. The allusion to Puncknoll is, besides, peculiarly unfortunate, for the descent in Collins, where not a word is said of Alexan-

¹ Vol. ii. p. 47.

der, the father of the Turkey merchant, being brother of Archibald of Merchiston—while a different descent is assigned him—was from a pedigree in possession of that line, which, therefore, with the previous one, and those first alluded to, far outweigh the insulated copy of Mr. Napier. It is rather amusing to find the Merchistons exclusively obtaining all their knowledge, through hearsay, from another country, as to the descent—if we coincide with them—of an immediate branch, purely of Scottish origin. It is like a Scotsman sending to America to learn a fact purely Scottish, and illustrating, as it were, *obscurum per obscurius*. Mr. Napier, also, seriously founds upon a random assertion of one Aubrey, (for he clings to English gossip,) but this p. 199. garrulous person, who was only born after 1634, to use a legal phrase, proves too much ; for, at variance with the previous certificates, he had an idea that the Luton-hoo ancestor was *brother* of their granter. He likewise adduces a pedigree which will elicit p. 202. some *special* remarks in the sequel, and, as will be seen, under the circumstances, is of no moment.

Upon the whole, the accounts do not coalesce with themselves, and are manifestly inconsistent and contradictory.

We have thus noticed all that Mr. Napier adduces in support of his theory—and upon such wretched adminicles, he draws the most irrelevant conclusion, that the descent he espouses is perfectly instructed, and that the author is rash and calum-

nious, in attempting to doubt it. Surely the learned gentleman must know that the above is not evidence in law—not only is it of a suspicious nature, but of the lowest character imaginable,—and it is a great fallacy in him indeed, to argue upon the previous scraps of paper, as if they were probative, and as if what they contain had actually been emitted by the first Lord. Nay, there is proof to the contrary upon their very face; they make mistakes in particulars into which he could not have fallen, and are obviously garbled and tampered with, either by interested or ignorant persons.

The author shall now state the evidence in refutation of the descent in question—as to Alexander *alias* “Sandy Napier,”¹ (real father of the Turkey merchant, and Warlock,) having been next brother of Archibald of Merchiston, and second son of Alexander Napier of Merchiston, father of the latter.

In the first place, there is the utmost taciturnity regarding *an* Alexander, the supposed son, both in Scotland and England. No proper proof has yet been adduced in support of his existence, and this is the more remarkable, because minute details are to be found upon record, of all the younger branches

¹ Mr. Napier lays great stress upon this *alias*, as instructing See Ps. 194, the descent, observing that it is the “Scottish diminutive of Alexander.” Even the Turkey merchant is *alias* Sandy, and others also of the family took this patronimic (as in the Highlands,) after their first and undoubted ancestor, who happened to bear the Christian name in question.

Mem. of Merchiston, p. 6.

of Merchiston, not only of a cotemporary, but of a previous date—fully affiliating them. In particular, Archibald of Merchiston had a younger brother Andrew Napier, burgess of Edinburgh—who also, upon Mr. Napier's theory, was brother of the Turkey merchant's parent, respecting whom and his concerns, every thing is legally unfolded. We find that he married Janet Kyle, daughter of Adam Kyle and Janet Meldrum, that they had a "merchant buith," in which they were "conjunct-fiars"—that he acquired his brother Archibald's "cattell, gudis, cornis," &c. with other similar incidents, unnecessary to dilate upon.¹ And this silence as to the supposed Alexander, either directly or retrospectively, is the more remarkable, as the Turkey merchant and Warlock became persons of far greater notoriety—the one on account of his riches, the other by reason of his eccentric habits. Alexander Napier of Merchiston, Archibald's father, fell at the battle of Pinky, on the 10th September, 1547, and not much more than a year before, on the penult of June 1546, there is a tack of the teind-sheaves of all the lands² of Merchiston, granted in these terms,—“Alexandro Naper de Merchiston, *Archibaldo* naper ejus filio et heredi apparenti, *et Andree* Naper ejus *fratri* germano,” which exhaust the substitu-

¹ See Tracts Legal and Historical, p. 139, 40. The other facts can be proved by the Acta Dominorum Concilii et Sessionis.

² “Totalium et integrarum terrarum,” &c.

tion.¹ It is very obvious that this was a valuable acquisition, of great importance to the immediate heirs of Merchiston, who are included, and if, as Mr. Napier asserts, the supposed Alexander had been the second son, he would have taken the place of Andrew, who, however, figures as such, and to the exclusion of younger male offspring.

But there is a still more material document, which must now be referred to. The confirmed testament of Alexander Napier of Merchiston, the father, dated 12th of July, 1548, and hence after his death, has fortunately been preserved, and, as might naturally be expected, determines the question. It recites the circumstance of his death at Pinky, besides containing an inventory of his effects, while his wife and family of course are mentioned. These alone consist of Annabel Campbell, his widow, *Archibald*, *Andrew*, Margaret and Mariot, their issue—whose existence can elsewhere be proved—but without the least allusion to an Alexander.²

¹ Chartulary of Holyrood-house.

² Napier Charter Chest. The author had long ago, with permission of Francis Lord Napier, grandfather of the present peer, examined the Napier wills in relation to a point in a litigation. See *Appeal Case, Duke of Roxburghe against General Ker* in 1822, p. 40. Mr. Napier, after slightly noticing the confirmation in 1548, in his *Memoirs*, refers us for it to No. IV. Appendix, but so much has the worthy gentleman been afterwards engrossed with his hero and the logarithms, that, to the horror and disappointment of Antiquaries be it spoken, nothing is to be found there but the "Theory of equations, and their ac-

This, therefore, is conclusive, for if existing, and especially the second son, the supposed Alexander could not fail to have been named,—as, independent of obvious considerations, he would be an heir in moveables, and, indeed, the first in this character. We have now, besides, obtained some solid and au-

cidents," *Mem.* pp. 47, 515. The author has been recently kindly favoured with a valuable and interesting communication, by George Frederick Beltz, Esq., Lancaster Herald, &c. the acute refuter of the Chandos claim, in reference to the present point, and another to be immediately noticed, of which the following is an excerpt. "I have amongst my papers, as executor of the late Sir Isaac Heard Garter, an apparently very well compiled account of the *family (that of Napier)* communicated in 1797, by the then Lord Napier, whom I remember. Upon that part where the connexion is presumed to have taken place between the Scottish and English Napiers, his lordship *does not appear to have found any evidence tending to substantiate that connexion*. The pedigree from the match with *Campbell (Annabel)* is thus stated in his Lordship's narrative." (Then are inserted, relative notices, that he was killed at Pinkey,—the confirmation of his Testament, 12th July 1548—"that the children mentioned in the testament are two sons and two daughters," after which Mr. Beltz gives us in these words the impression of Lord Napier as to the supposed existence of another son Alexander, alleged by ordinary authority to have settled in England.)—"But," observes his lordship, "as Alexander is *not* named amongst the children, who appear in the confirmation of their father's testament, and who were minors at the time of their father's death, *the existence of this Alexander must be very doubtful*"—a candid and intelligent remark, just what might have been expected from his lordship. Hence Mr. Napier's theory is actually disowned by the head of his own family, and no bad authority.

P. 200.

thentic proof, and if we apply it as a test to the brittle fabric of Mr. Napier, it will at once fall and be shivered in pieces. All he can urge in support of the filiation of his Alexander, is a passage in the alleged certificate of Sir Archibald first Lord Napier in 1625—upon which he must stand or fall—and which he confidently announces as follows: “ It only remains to see what was the precise relationship. Sir Archibald in his certificate thus gives it—Sir Alexander (of Merchiston)—had issue, Sir Archibald, and Alexander—Alexander, second son of Sir Alexander, and brother to Sir Archibald my grandfather, having *spent the greatest PART OF his youth IN foreign parts*, came into England in the time of King Henry VIII., and had issue” (*Sir Robert the Turkey Merchant, and Richard the Warlock, &c.*)¹ Mr. Napier here uses italics to shew the vast force and value of the intimation so italianized. If, however, he had duly weighed and sifted it—without dealing in tirade and rhapsody, he would not have formed crude and rash inferences, but would at once have detected the fallacy. The marriage of Alexander of Merchiston could only have been after the 9th of October 1533, which is proved by a dispensation of that date referred to by Mr. Napier,² his eldest son Archibald, therefore, (supposing him the eldest child, which he might not

¹ Among the many errors in these certificates, the parties are all unduly knighted,—of course what Mr. Napier italianizes is before “ issue.”

² Memoirs, p. 42.

have been) was merely a pupil in 1547, at the date of his death ; but if we believe the certificate, the Alexander, his alleged *younger* brother "*having spent the greater part of his youth in foreign parts*, came into England in the time of Henry VIII."—that is, in the interval between 1509 and 1546—the exact duration of the reign of that monarch. Upon the most favourable calculation for Mr. Napier, and holding Alexander did not go to England until 1546, he could only then have been a child of ten or eleven ;—and yet this is the individual, if we believe the authority, who, like another Ulysses, *post varios errores*, and the expenditure of his youth in an active career abroad, *at this very time* found an Ithaca in England, where he settled and reposed after the turmoils and agitation of a previous existence ! Such, indeed, is the conclusion we must come to upon this *most veracious* testimony,—equally refuting it and the trip to England, which was no auspicious dawning to future Merchistons in that country, but a mere hallucination, conjured up either by Jacob Chaloner or some officious worthy.—And by every rule of evidence, if Mr. Napier found upon one part of his authority, he must admit the whole—and necessarily the above, upon which indeed he lays great stress ;—for he cannot both approve and reprobate at the same time.

But the case does not even rest here. Mr. Napier refers to a pedigree of Luton-hoo after 1633, P. 202. which, he says, was " put on record," though with-

out adding from whence it was derived. Now the author has been favoured by Mr. Beltz with one of a corresponding date and substance, *from the Herald's College*, conceived to be the same,¹ which, like his, contains the descent that has been refuted, making the ancestor of the former the brother of Archibald of Merchiston. But, while it does so, it actually communicates a legal document respecting the said "*Sandy Naper*," the (Luton-hoo ancestor,) which is prefixed to the pedigree. It is a naturalization of that person by Henry VIII, and grants to "*Sandy Naper sub dominio regis Scotorum oriundo, seu quocunque alio nomine, sive additione nominis idem Sandy censeatur*,"² quod ipse de cetero ad totam vitam suam sit indigenus, et verus ligeus noster, et heredum nostrorum, et quod ipse in omnibus tractetur, reputetur, habeatur, teneatur, et gubernetur tanquam fidelis ligeus noster infra Regnum nostrum Angliæ oriundus, &c.—quod *dictus Sandy terras*, &c. infra Regnum nostrum, &c. *perquirere*, &c. *possit*."

Sandy, therefore, was a Scotsman, but that he

¹ Mr. Napier evidently has only obtained a partial excerpt.

² This points at other *aliases*, which seems significant, as these are common to border or Highland outlaws who have been obliged to change their names, among whom it is not unlikely that Sandy, who deserted his country's interests, was included. He may, not unlike a disguised Macgregor, have disused his own surname that may have been *barred* to him,—all this, however, would be mystery to his English descendants.

could not have been him whom the pedigree, and Mr. Napier fancy, is decided by the date of the deed, which is as early as the 14th of April 1541.¹ There can be no doubt, under the circumstances, that he, *at least*, must have been of age at the time; so the ancestor of Luton-hoo, Sandy Naper, (with his aliases,) must have been born long *before the existence of any* offspring of Alexander Napier of Merchiston, with one of whom, however, Mr. Napier maintains he is identical!

The document in question thus decidedly gives the lie to the pedigree to which it unnaturally forms a pendant, while, at the same time, exposing the ambition and pretensions of those by whom it was so anxiously, though unwittingly recorded.

It is amusing to observe the superstructure that Mr. Napier, as would seem, rears upon the certificate. "Alexander Napier of Merchiston, (he says,) killed at the battle of Pinkie, who was so frequently abroad,² had a son Alexander, who came immediately after his eldest son, Archibald, the philosopher's father. *Alexander seems to have accompanied his father in some of his foreign excursions, and was left by him in England, probably at school, before 1548. Instead of returning to his country* young Alexander established himself in Exeter, and

¹ It is under the Great Seal, and tested at Westminster.

² It may be here observed, that there are passes to Alexander to go to France, as Mr. Napier shews in his Memoirs, but none to England.

married an English lady, Anna, daughter of Edward Birchley, Esq. of Hertfordshire. Of this marriage there were two sons, Robert the Turkey merchant,"¹ &c. In this manner the supposed Alexander is made to accompany his father to England, and, to the discredit of Scotland, to be educated at an English school,—where, unfledged, and cut off from the parent brood, he is piteously left to shift for himself. It is, however, a great consolation to find that these woes are fictitious, owing to the non-entity of the individual.

The learned gentleman, with his inveterate love of English gossip, appeals to Lilly the astrologer, as a legal authority, but the author, as a lawyer, cannot condescend to such evidence, and, besides, this credulous fortune-teller has nothing upon the point at issue—the descent *from Merchiston*—which is noways alluded to,—and while retailing a questionable speech of James I., which is sufficiently exposed by Sir Walter Scott, it appears that the impression at court was, that the Turkey merchant's ancestry was brief, it being doubted if "he could prove himself a gentleman for three or four descents."² This is quite in keeping with the *parvenu* and ambiguous character of "Sandy naper." The former seems to have peculiar notions of evidence, for he regards the mere prattle of Lilly as sufficient to instruct what

See note to
p. 194.

¹ Memoirs of Merchiston, p. 238.

² See Memoirs, ps. 6, 7.

the Monarch actually uttered, and thinks that the subsequent hallucinations of the Luton-hoo Napiers, after emerging into rank and opulence, as to their Merchiston origin, is a strong refutation of the author's argument. That is, admitting at once the mere assertions of the interested party. He also founds upon the fact of the Turkey merchant being created a Baronet, which was never denied, no more than that he might have been the son of Alexander *alias* Sandy—all contended for is, that the latter was not of Merchiston.

Mr. Napier insinuates in his last performance, if the author does not admit the Merchiston origin of the Luton-hoos, he must find a descent for them elsewhere,—thus throwing an *onus* upon him—and shew “to whom related, and by whom begot.” P. 192. Never was so extraordinary an idea!—if there had been presumptive proof in favor of the former—it would have been different, but, as things stand, the author is as much bound to canvass the Huttonian theory of the earth, or to refute the first principles of phrenology. Although moral considerations may point otherwise, the law has laid down a maxim that here applies—“*de non apparentibus et de non existentibus eadem est ratio*,” and we must first conjure up some appearance of Luton-hoo as a Merchistonian—by other conjurors, too, than Lilly or Aubrey—before we undertake the task.

A descent from Merchiston being hermetically sealed up, it is a matter of no moment to inquire

from whence the imposition arose, in an age when nice notions of morality did not prevail, and then, as afterwards, strange practices were attempted in genealogy. Holding the Napier certificate, however, to be genuine, if it be asked, how Lord Napier could have been misled in such a point?—it may be replied, if, as follows from the copies, he was unaware of the existence of Andrew his grand-uncle, and did not know the proper designation of his great grandfather, while egregiously erring in other respects, he might have been equally deceived as to the Luton-hoo ancestry. There possibly may have been some ground-work for the thing; and the Peer, under the influence of a misrepresented surmise, while a better courtier than genealogist, may have been induced to hook Luton-hoo upon Ingliston. Such may have been the original texture of the web,—though altered and botched upon by Chaloner or others.—We have overlooked, however, an argument of the author of the Memoirs. The Napier certificate bears to have a preamble and attestation by Segar, Garter Herald, and he cannot contain his exultation. “Sir William Segar (he exclaims,) was at the time principal King at Arms for England. He was the *preux chevalier of heraldry*, and lived *amid a halo of its most brilliant recollections*. In 1586 he had walked as Portcullis pursuevant at the thrilling pageantry of the state funeral of Queen Mary. He became, successively, Somerset, Norroy, and Garter, herald, &c. &c.—Such was the worthy

to whom, at the request of the Turkey merchant, Sir Archibald Napier, (by this time deputy-treasurer of Scotland, and a Privy Counsellor,) transmitted a curious, though very imperfect, genealogical history of the family, which Sir William recorded with the profound respect and heraldic flourishes, wherein his duty and delight at once consisted."¹ This is all very striking, but let us see what transpires from Segar's biographer, and the partial namesake of the learned gentleman, the Reverend Mark Noble. He tells us that Segar was bred a "*scrivener*,"—oh, antechivalrous association!—of humble Dutch extraction, and that he incurred the Royal displeasure and was imprisoned, because "he had imprudently given *a man* the royal arms of Arragon, with a canton of Brabant, for the small sum of twenty shillings"—and, to add to our horror, *he* was John Brandon "*the HANGMAN of London!*" This no doubt was the consequence of a clumsy hoax, (if it can be called so,) played off upon Segar by York Herald, which he authenticated "with the profound respect and heraldic flourishes, wherein his duty, &c. consisted," but it was of easy detection, and the incident is very unfavorable to his knowledge and discernment as a herald. No arms are better known, or more frequently quartered than those of Arragon and Brabant, and, besides, being Royal, they could not be

¹ Memoirs, ps. 7—8.

granted without a corresponding warrant, far less be profaned by the vulgar.

“ For his *easy* belief and *ignorance*, (says Camden,) and for displaying the arms for so *small a sum* of money,” James I. “ was desirous to punish him,” and, therefore, both he and his brother Herald were lodged in the Marshalsea. Dethick Herald, though it must be confessed hostile to Segar, calls him “ a poor, base, beggarly painter, and an ignorant peasant.”¹ “ Such,” indeed, “ was the worthy,” whose misapprehension and venality were so marked, and with whom the wealthy Turkey merchant would find ready favor, the likely corroborator of the certificate, the *ultimatum* of Mr. Napier, and of the errors in question. We may well conceive what a critic he must have been in Celtic or Scottish derivatives—how familiar with Donald Nae-pier—and at what rate he must have foundered through the mists of the Lennox descent.

Mr. Napier must excuse the author's not dwelling upon another branch of English Napiers, whose alleged ancestor, John, or James of Swire (for he cannot tell which) is fancied to be son of Archibald Napier of Merchiston, who figured from 1482 to 1521, upon the sole credit of the far-famed certificate, which has certainly enough to answer for.

¹ History of the College of Arms, ps. 230—1—2. Of course, this was a single slip, for the English Herald's College, as is well known, is the most respectable body of the kind in Europe.

The principle in law, *falsum in uno, falsum in omnibus*, may indeed discuss it. There is no doubt as to the *Swire* line, the point being to connect *Swire* with *Merchiston* by means of a mighty bridge which yet remains to be built, and this was the object of the representatives, according to the certificate, in their application to Lord Napier.

The former thinks he has made a great discovery, when he finds there were *Napiers* at *Swire* in the sixteenth century, though unfortunately the first of them (of whom there seems to be evidence) is an *Edward* Napier vaguely referred to in the reign of Henry VIII.—that is between 1509, and 1546¹—and thus a cotemporary of John or James,—but as he cannot affiliate this *two-headed* monster with *Merchiston*, it is of the purest insignificance. He founds upon a monumental inscription so very late P. 211. as 1692, re-echoing the certificate without adding more of importance:—we must apologize to Mr. Napier for this hasty remark—the monument says that this *Castor*, or *Pollux*—John, or James of *Swire*² (whose existence is not proved), “supplied the several adjacent abbeys with fish,”—which he thinks “*invaluably corroborative*”—but how, does not exactly appear, and it would beggar us to fancy, un-

¹ It must, however, be observed, that Mr. Napier, under this head, appeals to no authorities, all is *ipse dixit*, though immaterial.

² The Monument also dimidiates the supposed ancestor in this way.

P. 211. less the only fish-dealers were Merchistons. Does the learned gentleman seriously suppose that this monument in 1692, erected too by the family—a *missing* brass-plate of which no distinct account is given, but only surmised to be in memory of an ambiguous person who lived more than three centuries ago—with his selling fish—can corroborate his being a son of Merchiston? It is obvious that such “*evidence*,” using *his* term, is empty, and irrelevant, and falls wide of the mark, though conceived by Mr. Napier to be “*excellent*,” and triumphant.¹ He has withal obscure intimations of some of the Swires bearing the arms of Merchiston after the beginning of the sixteenth century, and closes the subject with the most relevant *finale*, upon ordinary authority,² that a Napier in Devonshire in 1577, (which he calls a very early period) bore “*argent a saltier, engrailed betwixt four cinquefoils, gules*,” &c.

P. 214.

The importance Mr. Napier attaches everywhere to armorial assumptions or bearings, is extraordinary. Many then, as well as now, who happened to

P. 211. ¹ The Monument ends thus, “All this is attested by Sir Archibald Napier, Knight,” (the first Lord Napier,) &c. after stating that “King James the First—commanded Sir Robert Napier of Lutton-hoo—to send for his pedigree out of Scotland.” There is, hence, another interpolation besides the fish argument, which none of the other copies ventured to circulate, but it would be an extraordinary story that did not progress a little. Of course, Mr. Napier lays great stress upon it.

² Edmondson’s Heraldry.

bear the surname of ancient, or distinguished families, although not connected with them, adopted their arms. It may perhaps shock him to learn that his last authority, an obscure and illiterate person, once a vender of cheese in Leith, carried part of the *insignia* of the Edmonstones, who are proudly and justly claimed as relatives in the Memoirs,¹ but will Mr. Napier venture upon this to fix him upon their stem? He may also have heard of an American called Richmond, who gratuitously used the arms of the Duke of that name, whose pedigree is peculiarly *unique* and exclusive, but, according to his conclusions, a century afterwards the representatives of the said Richmond will have remarkable proof of a noble—nay even *Lennox* descent.

With respect to attestations of family pedigree in general, “or *birth-brieves*,” or “*bore-brieves*” as they were styled, which had the sanction of the King, Privy-Council, or Chancellor, and too often litter our records, their credit and authority are well known. They are mere *ex parte* proceedings, complaisantly winked at by government, or the chief of the name, commonly in favour of an influential foreigner, and abound in error and misrepresentation. The family of the great Colbert, after first brooking a refusal from Lauderdale,² probably from some pique, obtained in 1686, by his own influence, an attestation of their descent from the Cuthberts of

¹ P. 37. ² See Fountainhall's Decisions, vol. I. p. 417.

Castle-hill, which had the interposition of an Act of Parliament¹—a salutary step, if it be possible to white-wash error. There seems to be no proper evidence in support of the pedigree, which even makes the French Secretary of Saintly origin, connecting him with Saint Cuthbert, and the birth-brieve,² like one in 1683, in favour of Don Joseph Cantelinus Duke of Popoli, and his brothers, is a tissue of fable and grandiloquence. The last, however, out-herods Herod. All our ancient and questionable monarchs, as in Banquho's mirror, though in inverse order, are brought into view—even previous to Christianity,³—and turn out to be the kindred of these Italians. Nay, the exact line of descent is fixed. Malcom *Can-more* (*Great-head*,) it seems, had a younger brother *Everard*, who, that he might not be inferior to him, was termed "*Can-colin*, i. e. *firm* or *sound-head*, or "*Cancolin*,"⁴ by corruption "*Cantelin*;" and thus arose the Cantelini. The Duke de Popoli was unhappy in the choice of

¹ Acts of Parliament, Vol. VIII. p. 611.

² Ibid.

³ Achaius, Ethonius, Ethodius, Fergus son of Erth, &c. &c. The warrant, under the sign-manual, dated 25th of August 1681, is in his Majesty's State Paper Office, and asserts that the family were sprung "from the line of our Royal predecessors, Kings and Queens of Scotland, by a continued course of pedigree for about three hundred and thirty years before the incarnation of our blessed Saviour." The Bore-brief, which is in the Great Seal Record, passed afterwards in 1683.

⁴ "Popularibus jamdudum suis a capitis firmitate, et judicii, *Kan-colin* dictus."

the name of his ancestor, which breathes too much of "the air of the sweet south," and the rougher appellatives of Dovenaldus, Dunecanus, &c. more of an Arctic character, and better suited to adamantine capacity, might have been preferred.

The most ludicrous instance of the kind, perhaps, is in the case of a singular character of the name of Menteith, a member of the Church of Scotland. He had been guilty of gross immorality, which compelled him to fly to France, where, turning Jesuit, he wormed himself into the favor of Cardinal Richlieu, by the usual luck attendant upon Scotsmen—especially in that century—in foreign countries. The Cardinal, naturally, when he first presented himself, inquired to what family he belonged, which was rather a poser to the ex-pastor, whose father, an Edinburgh burgess, had *netted salmon* on the banks of the Forth,—but, too much of a tactician to be taken unawares, and a humorist withal, he truly answered that he was of the Menteith's of *Salmonet*, (*Salmon-net*,) which perfectly satisfied his Eminence, who knew as much of the one as the other. Salmonet, for he assumed this as his designation, according to French fashion, even afterwards, became the Secretary of Cardinal Retz—to whom he bore some resemblance,—and in 1648, by the interest of his patrons, he and his brother Patrick, (also in Retz's household,) obtained a bore-brief from Scotland, at once surmounting the salmon-net, and planting them, to the surprize of their countrymen, in the

house of Menteith. It, at the sametime, made them quite Baronial, and connected them with the noblest descents. Salmonet too, however it may commove Mr. Napier, was so bold as actually to assume the Menteith arms, as is proved by his portraits, and thus to arrogate what he would hold to be evidence of a Rusky descent.¹

If Mr. Napier had a little more experience in these matters, he would not be so horrified at the attempt that has been exposed in the case of his family, or unwittingly take in high dudgeon, as reflecting upon the phenix-like characters of supposed kinsmen, a thing that was of common occurrence. Like the old and faithful pendicle of the house of Ravenswood, many were disposed to be *splendide* mendaces for the aggrandizement of their name. In fact, contrary to the stigma of Dr. Johnson, and preferring truth to our native country, we are compelled to confess, that no Scottish pedigree is to be trusted if not supported by legal evidence.

In 1639, honest Mark Duncan, a medical doctor of Saumur, like the bos *optans ephippia*, also be-

¹ For particulars and authorities regarding Mr. Robert Menteith, ex-minister of Duddingstone, Jesuit, Public Secretary, Canon of Paris, Historian, &c. not to add the other propensities he mixed up with these characters, see Appendix, No. IV. The name is inauspicious to Presbyterian purity, as much so as "the House of Hailes" to the virtue of our Queens, for there was another Mr. Robert Menteith belonging to the same body, also *notorious* in the 17th century.

dized himself in glittering trappings, to surprise his Gallic acquaintance. He too, it seems, was “*ex splendidissimis familiis tam a paterno, quam materno genere,*” and many other examples might be cited.¹

The oldest instance of a bore-brieve, attended with proper forms, when such productions might have been more trust-worthy, occurs in 1510, in a proceeding before the Daily Council, then the Supreme Civil Court, where the King occasionally presided. The record bears that Francis Forrester *alias* Pitlard, Herald to his most Christian Majesty, appeared before them, and stated that although born in France, he was of Scottish descent, being sprung from the House of Corstorphin; but as the circumstance was little known there, he petitioned the King and Council, that they would inquire into the matter, that he might avail himself of the result on his return. His petition being received, and it being remitted to the Clerk-Register, and certain Lords “*ut justam cognitionem coram eis de origine ipsius Francisci caperent, et quod desuper litere testimoniales in forma debita, sub ipsius magno sigillo, eidem darentur,*” they forthwith issued warrants to Sir Alexander Forrester of Corstorphin, knight, Alexander his son and apparent heir, and other respectable persons connected or acquainted with the

¹ Mr. Mark's bore-brieve, and the previous ones are upon record.

family of Corstorphin, to appear and depose as to the truth of Pitlard's allegation. Who, accordingly coming to Edinburgh, and being sworn "*deposuerunt, et declarerunt eundem Franciscum Forrester, alias Pitlard Heraldum, de prefata domo recte descendisse, et attingere in tertio, et quarto consanguinitatis gradibus prefato domino de Corstorphin superstiti, et dominium ejusdem nunc possidenti, in quarto videlicet ex parte dicti domini de Corstorphin, et tertio ex parte dicti Francisci, prout ex vera scientia et relatione majorum suorum dedicerunt, et noverunt, unde arma ejusdem domus et cognomen gestare meruit.*" After which followed due intimation and publication of the fact to the lieges.

It need not be observed how transcendent these attestations are, and far superior to the modern scraps of paper in reference to Luton-hoo, &c. *ex facie* only vouched for by Segar. The last never can be compared with the former, which had every thing they want—the solemnities of legal deeds, affixture of the great seal, and even sanction of Parliament,—and yet all, with perhaps one exception, were bubbles that dazzled for a moment, and as quickly subsided into nothing.

¹ Act. Dom. Con. Lib. 22.

² Mr. Napier is so confident in his alleged descent of Luton-hoo, as to urge, in reference to a sceptical observation of Sir Walter Scott, that he "*was not aware of the near relation-ship existing between the great Napier,*" and the Warlock,—

Mr. Napier alludes, in the *Memoirs of Merchiston*, to the supposed warrant by James V., to John Scot of Thirlestane in 1542, for the Royal Tressure in

that is, he was clearly ignorant of what turns out to be unfounded. In these circumstances, the author naturally observed that the learned gentleman here charges "Sir Walter Scott with ignorance *owing to this remark*," i. e. *the sceptical observation* thrown out by the See Tracts, Baronet, which was essentially just,—of course with ignorance on- &c. p. 137. ly so far as resulted from it. But, would it be imagined that the and former asserts that the author has, in this instance, altered his "plain P. 7. words," and *perverted* them to "an offensive and derogatory meaning?" He should have been more careful to have taken the note out of his own eye; for it happens he has ascribed words to his opponent which the latter never used—(and what is more objectionable, argues upon them,) as is proved by the following passage, "Yes, *says* the author of the Tracts, but in the year P. 212. 1625, the distinguished families of Tintinhull, Middlemarchall, Puncknoll, &c. had all become ashamed of the *fishman* of Swire, and as the Turkey merchant—the novus homo of Lutton-hoo, &c.—was getting a pedigree to himself from Scotland under the auspices of James VI. they conceived the idea of being included in the same patent of gentility"—"and this lacteal relationship (a phrase that much annoys Mr. Napier)—probably was the cause of *his* (*Lord Napier's*) own subsequent elevation to the Peerage." It will be seen upon the most casual survey that not a word of this was ever uttered by him, nay, the fishman of Swire, with the *fearful* piscatory argument, was not then brought into the controversy, or alluded to. There is another misrepresentation that may be noticed. The author, immediately after touching upon the absurdity of the Lutton-hoo descent from Merchiston, observed that his opponent would "have a *better* See Tracts, soil to work upon, if *they*, (including himself and his chief) in- &c. p. 140. vestigated into the *descent* of their male ancestors, the Scots of Thirlestane,"—that is, than indulging in Lutton-hoo reveries. But, upon this *sole* remark, Mr. Napier charges him with sug-

acknowledgement of his services to that monarch.¹ Owing to this circumstance, and an important discovery of the author in relation to it, he was induced to notice the subject, which is curious and historical, and indeed had long ago been discussed by Francis Lord Napier, and Pinkerton. While he observed that this discovery—a confirmation by King William in 1700—homologated and ratified the right in question, he adverted to certain incidents that led him to infer “that there was something suspicious in the transaction.”

P. 222. It had not been his intention to go further into details, but as Mr. Napier attacks both the latter conclusion and his proposition, that “a palpable error (such as will be noticed,) countenances the idea of forgery,” he must proceed to defend them.

What was conceived to be the grant or warrant of James V., is dated at Fala-moor, on the 27th of July 1542, while it is certain that the king was not there until the succeeding October. If the error had merely consisted in the date of the month—supposing it had been the tenth, instead of the 20th

P. 219. gesting, that he should have preferred “*Memoirs of Thirlestane* to those of the *inventor of Logarithms*.” He even says, that the author here has “a *censure* (of him) for his *ill-judged choice of a biographical subject*, in the *Memoirs of Merchiston*!” His late book, in many respects, is a rash and hasty performance, although there may be some palliation too, in the utter hopelessness of his arguments.

¹ P. 45.

of October—it might have been more of a clerical character, but it is too great a stretch to maintain that the substitution of a totally different date and month, only proceeded from inadvertency. The author must disagree with Mr. Napier in holding, that, on the supposition of forgery, it would have been better to have left the date blank—that would at once have excited suspicion, as no genuine deed is without a date, and, therefore, if this was to have the effect of one, it must necessarily be attended with such legal requisite.

That the impression is a natural one, may be also inferred from remarkable forgeries having been exposed by a mere anachronism, which, upon any hypothesis, does obtain in the present case. The first Lord Haddington, as is well known, discovered that a writing was a forgery, by the fact of the stamp, which was posterior to its date. Men in such emergencies are not always cool and collected, and the agitation of the moment, with perhaps the consciousness of guilt, and fear of the consequences, deprive them in some measure of the fair and unclouded use of their minds. This may be a wise dispensation of providence, countenanced by the apothegm “*quem Deus vult perdere prius dementat.*” It was a similar flaw that exposed a fabricated signature of the honors of Stirling in an action before the Court of Session, Spottiswoode, Archbishop of Anno 1833. St. Andrews, figuring as a witness, who had shortly predeceased. Nay, it is remarkable, that Hawkins,

in his pleas of the Crown, in giving the definition of forgery, exemplifies this very case. He says, that it consists in making "*a man's act appear to have been done at a time when it was not done,*"¹ as *de facto* obtains in the supposed warrant of James V., who is made to execute a grant at a time when it was not executed.

We may next ascertain in what light our law regarded such an incident in a deed, and it is clear that the error was fatal to its authenticity. On the 17th of June 1571, the Commissaries of Edinburgh, (to whom by the old ecclesiastical usage, such points came to be competent,) found that an infetment was null, because it bore upon its face a wrong date.²

The considerations by which Mr. Napier has lately attempted to shield the warrant from the suspicion of forgery are at best problematical. He says it has the repetition of the words "of, of, of," which he thinks a forger would have avoided ; but there is here nothing contradictory, it might have been natural accident, or artfully done, to palliate the glaring error in case of detection, which might have been dreaded through ignorance of the dates of the arrival and stay of James at Fala,—difficult precisely to ascertain. The redundancy is not to be assimilated to the flaw in question, which is without a natural

¹ C. 70, § 2.

² Acts and decreets of the Commissary Court of Edinburgh of that date.

apology, being an irrelevant introduction, and clearly repugnant to probability.

He also affirms, that as the warrant bears to be P. 224-5. under the privy seal, the corresponding one should have been appended, but there is here a great misapprehension ; in such writs, the wax impression of the seal is upon the deed itself, which nearly in every case quickly vanishes and falls of—so that the seal either may have been there, or the necessity of such addition escaped fabricators. He adds, that “ the P. 225. King’s signature at the top,” is not “ like that of James V.,” nor the writing co-temporary with him, which all seem further indications of imposition.

Mr. Napier’s argument goes upon the idea that great skill is essential to the notion of forgery, but this is a mistake, for there are many clumsy and blundering forgeries, which may further obviate his remarks upon the way in which, according to him, the date and figures are written. He states that the date is filled up in a different hand, “ and is obvious- P. 224. ly an awkward attempt to copy ancient figurate expressions.” The author has not seen the document, but this appears a strange circumstance, and to make against it, (though there are instances of ancient deeds *partly* written in different ink,) for why, if, as Mr. Napier affirms, this is a mere copy, need the transcriber have attempted to imitate the characters of the original, when the modern fashion of the letters or figures would have sufficed ?

It is also very evident that error and imperfect

execution might be especially expected in the forgery of an old writing, as few are antiquaries, or properly versant in what constitutes its validity.

To some persons, it is thought, Mr. Napier, from his tone and "lengthy" discussions and appeals to the public, would seem to make a "matter of life and death" of family distinction—to use the phrase applied by Lewis the Fourteenth to the Duchess of Orleans on a similar occasion; yet he conceives it impossible that one formerly in Scotland could use undue means to secure a privilege that as much raised him above his compeers, as Oliver Sinclair was elevated by a rash act of his Sovereign above all the nobility. Forgeries of old were very common—Mabillon maintains that most of the title-deeds of his church are surreptitious,—and they have often been attempted in secondary cases, and by way of hoax. There was a forgery not long ago in the west country in favor of free-masonry, detected by the appearance of a surname of later introduction—a mere anachronism as in the Thirlestane warrant. And the playful fabrication of a late amiable and lamented advocate, preserved in the Skene charter-chest, still interests and deceives antiquaries—nay, even Aberdonians—where Robert I. makes a grant to a Jew under the *reddendo* of "*duo aurata preputia*."

The author may reply to an inquiry of Mr. Napier, that his remarks were chiefly directed to the warrant in question—that published by him which "had been *long considered*" (by the family,) "as an

original." We have this upon the direct assertion of Francis Lord Napier,¹ and the weighty authority of Nisbet our first herald, who says that he saw "*the principal*"—the *same* given in his work, and *admitted by Mr. Napier* to be the *former*, in the custody of Sir William Scot of Thirlestane, who of course must have shewn him it.² The fact of its registration too in 1713, seems corroborative, for parties would not be at the pains of registering a P. 225. secondary copy, as he thinks it actually must have been. The circumstance of the non-production in 1700 may strike us as remarkable, but we might also infer that this was owing to some distrust of the procurator in its appearance, who, therefore, may have preferred a copy in an inventory, which is al-

¹ These are his precise words. See Wood, Vol. II. p. 281—98, and Memoirs of Merchiston, p. 7.

² "The *principal of which* (the grant or warrant of James V.) *I have seen, now in the custody of the present Sir William Scott of Thirlestane*, inserted in the first volume of this system, page 96."—Heraldry, Vol. II. Appendix, p. 36, *new edition*. Nisbet also alludes to the writing, in the same way, in his curious Essay on Armories, published in 1718, calling it a "*warrant*;" see p. 140. Sir William Scot and Nisbet were cotemporaries, both figuring before and after 1700. The author, as previously observed, has never seen the writing, but Mr. Napier says, that it is in "*an old-fashioned hand*," and hence may be considerably P. 225. prior to 1700. Following out an analogous principle as in the Luton-hoo instance, he seems to think that his opponent must show who the forger is, supposing the writ surreptitious, but this is a palpable fallacy. There is no such *onus* imposed upon him, and it must stand or fall by itself, and the relative circumstances.

luded to in the confirmation as the sole writing warranting the grant.¹ Subsequently in 1713, after the right of the double tressure was confirmed to the family—there could be no official discussion, even when the supposed warrant was put upon record, which is a mere *ex parte* proceeding—the original being returned to the owner, while a transcript is retained,—and it may be asked if the inventory, as Mr. Napier represents, was the chief and preferable authority, why was *it* not recorded? Was it because, as would seem, that a principal was better than a copy in an inventory?² The confirmation, indeed, says there was no principal—but this is expressly contradicted by an important testimony at the time, as well as by the belief of the family, who transfer that appellation to the warrant in question. Altogether there is a strange medley of mystery and confusion in the matter,—and it must be again observed how satisfactory it would be if some seal of the Scots of Thirlestane could be found between 1542, and the reign of Charles II. inclusive, particu-

¹ The confirmation proceeds upon the sole representation of the Lyon. As was shewn in the case of our birth-briefs, we were not too scrupulous in our evidence in heraldic cases, but still there would be some investigation on the occasion. No legal evidence, however, was adduced. Besides the inventory, “good testimony” is alone appealed to, which is clearly oral, and cannot instruct a point so ancient as 1542.

² Mr. Napier informs us that no trace can be found of the inventory, and that the supposed warrant *is on parchment*, which is odd, if a copy.

larly in the sixteenth century—though even later. Mr. Napier says that the old Thirlestane papers and seals are lost, but surely, considering the rank and importance of the family, their public acts and services, upon which he dilates, a memorial of the kind could be found elsewhere. There must have been many transactions between them and individuals—and they must have been upon the retours of their neighbours, which would equally have their seals and subscriptions. It is difficult to conceive they could, after all, have been so inglorious as not to leave some armorial remnant behind. It would be also important legally to fix the existence of the Fala hero, John Scot of Thirlestane in 1542. Mr. Napier observes that the Scots of Thirlestane were originally of Howpaslet which was their ancient designation, but the representatives at the time were Robert and Walter Scots. This is proved by a royal charter in 1540, to “Walter Scot, son and apparent heir of Robert Scot of Howpaslet,”¹ and both figure in a process in the year 1552.²

P. 232-3,
&c.

P. 227.

Now it will be observed that the Napier genealogy makes John Scot of Thirlestane, son and heir of Robert of Howpaslet,³ which is ideal, and Mr. Napier, as usual making things worse, represents the

¹ Reg. Mag. Sig. Lib. 26, No. 395.

² They are there described thus, “Robert Scot of Howpaslet, and Walter Scot his sone and apperand air.” Act. Dom. Con. et. Sess., Vol. VIII. under date, 18th January.

³ Wood, Vol. II. p. 297.

Ps. 228-9. Hero of Fala as the offspring of David Scot of Howpaslet, who never existed. Faithful in his attachment to the lowest class of evidence, he attempts to illustrate the early pedigree of Howpaslet and Thirlestane, by that wretched Doggerelist Satchell, and just with the success that might be expected.

The first title of Thirlestane in the Scots was in 1568, in the person of Robert Scot. In that year Michael, Commendator of Melrose, upon the preamble that it was lawful to grant their possessions in feu-farm, for the increase of the rental to native tenants, by whose prudent management it might be bettered, conveys Thirlestane in this way to the former, and to Robert his son and heir, in perpetuity, under payment of a yearly sum.¹ The charter contains a precept of seisin in usual form, thus constituting an absolute and heritable right. We hence see also what foundation there is in the Napier genealogy, for the assertion that Thirlestane was acquired by David Scot of Howpaslet, from whom it seems it came to the Hero who figured at Fala-moor.²

The above then are subjects deserving Mr. Napier's attention as an antiquary, calling for his researches; and if he shall succeed, as is hoped, in obviating all objections, none will feel greater pleasure than the Author. It may be also observed, that mot-

¹ Engrossed in a confirmation dated 14th December 1577, Reg. Mag. Sig. Lib. 46, No. 119.

² See Wood, Vol. II. p. 297.

tos in 1542 were not in use among our barons, or those of inferior rank like the Scots of Thirlestane. Mr. Napier will find upon examination that there is not a single one in the seals of any of the nobility or persons appended in the same year to the great act of recognition of James Earl of Arran as governor of the kingdom ;¹ yet the Thirlestane grant confers a motto, and thus anticipates a later introduction. It is very true that the exploits of the Hero in question may have been so transcendant as to have outstripped common form, as well as fame, but still we would like to have a little more evidence in the matter.

From what has been thus stated, it is submitted that the author was justified in his propositions, and it is evident that the question, being before the public, was fair and legitimate discussion. Yet Mr. Napier waxes wroth, and is strangely indignant at his comments, treating them more as a suspicion of forgery against himself, than simply attaching to the deed—while, at the same time, he is not disposed to admit that the Thirlestanes were very correct in their acts, or much better than their border neighbours. Ps. 225-6.

There could not have been a more honourable and high-spirited man than Francis Lord Napier, who has been alluded to. He, indeed, was a *preux chevalier*, and it may be asked, did he take umbrage, or vent himself in words, at the attack made upon the warrant by Pinkerton, who was the originator

¹ Acts of Parliament, Vol. II. p. 593.

of the controversy ?¹ He certainly did not, but, like a cool and candid person, met it in the proper way by a dispassionate investigation into the circumstances of the case, which he communicated to the world,² although making against the writing. It, therefore, is not competent to the former to resent the author's criticism, especially when intended to illustrate a fact in history connected with the exploit of an ancestor.

But while Mr. Napier is thus so sensitive and splenetic, he does not prescribe a very limited scope to himself in his remarks upon others. He complacently chuckles at his witticism of "the silken bonds," and other touches that represent the ancestors of the Craigs of Riccarton as mere *modistes*, besides unfoundedly attaching bastardy to the mother of the Feudist.³ The highly respectable Andrew

¹ See his History of Scotland, Vol. II. p. 381.

² See Wood, Vol. II. ps. 28—198.

³ Memoirs, ps. 98, 99. It is evident from the costly articles sold by Robert Craig, the Feudist's father, who was burghess of Edinburgh, including gold and pearls, &c. exported by him from abroad, that he was a foreign merchant of high account. This is rather a delicate topic for Merchiston; before pronouncing at once upon the comparative degrees of burghesses, in those days, it might be necessary to ascertain the articles that our friend Andrew, uncle of the great Napier, sold "in his buith," as well as the precise avocations of the other members who followed that useful profession. The younger sons of good families, however, were occasionally merchants in the sixteenth century, and the term did not altogether possess the signification in modern times.

Stuart was distinguished as an antiquary, he was a true disciple of the Hailes school, and one who, by his researches, has cleared up contested points of importance. In his History of the Stuarts, he possibly commits a slight error in saying, that John Lord Darnley, in 1473, was retoured heir to Duncan, Earl of Lennox, in part of the fief, through *Elizabeth* his daughter,—which he is in fact—although it has been said she is not mentioned by name. Yet Mr. Napier, who at the same time admits he has not seen the retour, merely upon this slender incident charges the former with unbecoming conduct, for he harshly affirms, that “*so uncandid* a statement was scarcely to be expected from a writer of his P. 59. station and character.” At this rate, the learned gentleman would find no mercy, for through hurry or inadvertence he has made sad work of the last clause in the protest in 1485, mistaking the sense, See above ps. 13-14. and making an act appear to be future when it was past, besides employing words in the translation that do not seem to be warranted by the original.

The author, however, is not disposed to be severe with Mr. Napier for this—it is only what may be looked for in such collisions—“*scimus et hanc veniam damus petimusque,*” &c.—and it therefore may be pardonable to submit his speculations to the same ordeal, without exciting undue feelings on his part. Literary discussion is of the nature of a republic, and not subject to arbitrary rules, the “*libertas* being *sumpta decenter.*” The learned gentleman has

come publicly forward, and favors the world with his views upon certain subjects, especially of an antiquarian kind,—and is it at all unseemly that another antiquary, who differs in opinion, should attempt to grapple with him—nay, is there any thing to preclude his tilting with him upon any subject—even criticising the merits of the great Napier? He has brought his family and heroes upon a public plain, thus inviting scrutiny and discussion, which is fair upon *every item* that he broaches; and if he be found wanting, and the ice break beneath their feet, the fault attaches to himself and not to the author. It is in controversy as in other things, the halcyon expectations of a party may be disappointed, but still one pleasure results from the elucidation of truth, that may act as compensation, and prove an unction to the wound that is inflicted.

Mr. Napier also complains of what he conceives the ironical and sarcastic style of the author in a late article, though not much tinged it is thought with that quality,—but, upon due examination of his own disceptations, their tone and peculiar character, may it not be a question if he is more sinned against than sinning; and, to compare great things with small, if there be not some analogy between the imputation, and the case of the “Gracchi de seditione querentes?” It is unnecessary, however, to make this a ground of vituperation, for the best writers, not omitting Mr. Napier, deal in sarcasm

and contradiction; and the author must confess, that he is rather partial to free discussion, from which certainly greater benefit is to be derived than from the undue *retenu* or pliancy that distinguishes some of our writers, and elicits the satire of Lord Hailes. The enthusiasm and ardent zeal of Mr. Napier are no bad condiments for an antiquary, and, combined with his other qualifications, may render him a successful cultivator in the vineyard of antiquities.¹

Whatever may be the insignificance of the present topics, which the writer is not disposed too highly to prize, but which, from being contested, become interesting, if they are to be discussed at all, to use an English phrase, there must be a fair field and no favor, while the various facts and inferences are viewed through the most abstract *medium*, without the delusive halo that attends private impulses. It is in conformity to this rule that the author acts, without any hostility to the family of Merchiston, to whom, as is evident from the controversy, and even Mr. Napier's admissions, he has given acceptable information.

Mr. Napier has been now fully discussed in every thing material. There are a few inferior miscellanies of little import with solid facts, "*rari nantes*

¹ He instructs an important and original fact in reference to the duration of the regency of Robert Duke of Albany, at p. 9, of his last work.

in gurgite." He cherishes the seals of Merchiston as the apple of his eye, which he has called "an interesting and remarkable confirmation" of, and justifying the *male* descent of Merchiston from Lennox¹—most naturally indeed, as they are the only evidence of the fact. To this dubious adminicle, as it must be termed, the author did every justice in a late article. As others, and particularly Sir David Lindsay, however, represented matters differently, he was thence disposed to be a little cautious, and used in his remarks the qualifying words, "holding the *seal* (*that in 1453*) to be genuine,"² a form common in legal argument when a party who admits a fact does not wish to foreclose himself. He has also the fullest sanction for the step, on the authority of Mr. Napier, who rapturously exclaims in relation to another heraldic point,—"*Who knew better than old Sir David?*"

Still is thy name in high account,
And still thy verse hath charms,
Sir Daved Lindsay of the Mount,"³
&c. &c.

It would therefore have been highly irreverent in the writer to have overlooked one for whom the former has such deep respect; and in this dilemma between the seal and the herald, somewhat like

¹ See Memoirs of Merchiston, ps. 9—11.

² See Tracts, &c., p. 125.

³ Memoirs, p. 12.

Mahomet's coffin, his opinion was suspended, for which, as in the case of neutral politicians, who eschew a decided part, to give offence to none, he has received no thanks.

The etymological ingenuity of the learned gentleman is not peculiarly happy. To show the little force of the argument of the male descent of Merchiston from Lennox, from the mere coincidence of the arms, the author adduced a genuine seal of Willielmus Pertus of Peebleshire, appended to a deed, in 1439, in the Cumbernauld charter chest, which exhibits the simple coat of Lennox. There is little doubt that this is the same surname with Portuus or Porteous, of some note afterwards in the same county; at any rate, it is not Napier, and hence, upon nearly equal grounds, it may be contended that the former were of Lennox, the essential reasons concurring in both cases, for cadets occasionally bore the principal arms. In these circumstances Mr. Napier, who has not seen the seal or deed, supposes that the name is not "Pertus" but "Perlus," or in other words "Peerless," and therefore "Nae-pier"—adopting the absurd and fabulous story in modern times. It is hardly incumbent to add, that neither Perlus, the meaning of which is unintelligible, or "Peerless," are original Scotch, or then employed, while the cotemporary orthography of "Napper" (not Nae-pier") allows no scope for the inference.

Having discussed this formidable argument, it

may be observed that vassals in Lennox (where the Napiers anciently figure,) although like them of a different surname, often bore the arms of their superior, the Earl of Lennox—sometimes with a difference, and sometimes without one. These facts can be shewn in the cases of the families of Douglas of Ledcameron, Lindsay of Bennule, and Blair of Finnick, in the fifteenth century,¹ but the discrepan-

¹ As proved by their seals—Blair of Finnick bore the simple arms of Lennox, as if he had been Earl of the fief.—Douglas of Ledcameron (or Mains,) Douglas, with the Lennox cross, but with the difference of omitting the roses; Lindsay of Bennule, the cross in the same way, quartered secondly and fourthly with his proper arms. This last instance seems parallel to that of Merchiston as given by Sir David Lindsay, being Lennox with a difference, (probably as arms of vassalage) in the first and fourth quarters, while the second and third are left blank,—in all likelihood for Napier proper, which, however, has been allowed to be eclipsed by Lennox, especially after the alliance with the Lennox co-heiress. Mr. Thomas Crawford, professor of mathematics in the College of Edinburgh, cotemporary with Charles I., says, in confirmation, that the family of Merchiston, before their elevation to the peerage, *impaled* the arms of Napier of Kilmahew with Lennox; and it is certain from the seal of Archibald, first Lord Napier, appended to his portrait by Mr. Napier, that he bore the principal charge or device of Kilmahew—the *crescent* in the crest, which may have been in remembrance of their original descent. Other families in the Lennox, took the Lennox roses without the cross, (a clear difference) as feudatories, so if the Napier argument is to infer a Lennox descent, many stranger surnames would be entitled to the same honor. *Majus et minus non variant speciem*—the Merchistons, as their difference, diminished the Lennox coat by ingrailling the cross, the former by omitting the cross, or roses.

Original
Register of
Arms, Ad-
vocates'
Library.

Tracts, &c.
p. 125.

Memoirs,
p. 299.

cy in the surname renders the incident of little or no weight.

Upon this point, the remarks of the Quarterly Review are so just and apposite that they may be here inserted. "We think *he* (Mr. Napier) might have spared us the old woman's story about the first Napier being a second son of some antique Earl of Lennox, &c. The only shadow of evidence in support of this legend is in the fact, that the Napiers of Merchiston bore, as far back as their line has been traced, the ancient arms of Lennox, with such a slight variation as might naturally have been adopted by a cadet. But the existence and fortunes of a second son of such a house, at a period after Scots kings had ceased to speak Gaelic, would have no doubt been traceable in the chartularies of a nation proverbially studious of pedigree; and as to the matter of arms, why, if the legend of the name be true, should the Merchistons have been the only Napiers who bore the coat of Lennox? They *may have been originally*, as some other families of the same name were, *vassals* of the ancient Earls of Lennox;¹ and, *in this case, an adventurer removing into another part of the country, might have chosen to set forth with a difference the escutcheon of his chief*,² whose protection he still

¹ The Napiers of Kilmahew, the oldest family of the name, certainly were so, and always figured in Lennox.

² Chief is evidently here used synonymously with superior—at least not *ratione sanguinis*.

looked to in case of need, rather than the obscurer insignia of his own immediate race. We will not chase these dreams further.”¹

It may be also not irrelevant to see what was the opinion of Francis Lord Napier upon the Merchiston origin and pedigree, which the author is enabled to illustrate by means of a communication from Mr. Beltz, who has supplied him with the following excerpt of a letter by his Lordship to Sir Isaac Heard, Garter, in 1797. “ You will find *it* (*his genealogical narrative*²) differ materially from Crawford and Douglass’ Peerages, and from what you will find entered in the records of your office in the time of Sir William Segar. It may be presumption in me to vary from such authorities, but having bestowed some degree of labor and attention in searching my family charter chests, I am led to believe *they have frequently been erroneous* in the pedigree they have drawn up of the Napiers of Merchiston. What I now send you I have marked my authorities for, and have endeavoured *to avoid wandering into the regions of fancy*. The *legendary tale*, as to the *origin* of the name, I have related, because others have done so. But I by no means insist on your believing what I am not thoroughly convinced of myself. Neither will I answer for the four first personages in the pedigree as being actually my ancestors.”

¹ No. 104; ps. 154—5.

² Which Lord Napier forwards to Sir Isaac.

The author remarked, in his late article, that “the principal representatives of Lennox” “occasionally” carried the Lennox cross ingrailed. The fact is self-evident, and even proved in respect to the *Darnley* Lennox co-heirs, by seals in the memoirs of Merchiston—it being well known that all heirs-parceners, or principal representatives, had equal right to the chief arms. Mr. Napier challenges him to produce “a single instance of such practice previous to James VI.” If he had examined the genuine P. 38. blazonry and arms of the nobility of Scotland in the British Museum, and Advocates Library during the reign of Queen Mary and sixteenth century, his wish would have been gratified. From them he would have learned, that Darnley, James the Sixth’s father, as well as Darnley’s own parent, bore the cross in this manner, independently of other authorities. Subsequently the Haldanes of Gleneagles conformed to the practice, of whose claim to be the *principal* Lennox representatives it is now thought there can be no doubt.

The feeblest effort of Mr. Napier is that directed against the author’s refutation of the supposed descent of the Menteiths of Rusky from the noted Sir John Menteith,¹ as maintained by the former in his memoirs. He does admit that the thing may be as the P. 254. writer stated, and that Ruskymay have been of another stem. At the sametime, he cannot resist the tempta-

¹ See Tracts, &c., p. 149, *et seq.*

tion of contradicting him. The matter stands thus. It is incontrovertible that Sir John Menteith married Elena de Mar, by whom he had a son, John, who succeeded him in his estates, and died without issue, when the *lineal* representation devolved through *their daughter*, upon the ancestrix of the present Earl of Mar, who in this way derives his right to the earldom of Mar, which came to center in the *heirs-general* of Elena. These facts are legally proved, and there being no notice of any second marriage of the Knight, the obvious presumption in law is, that Elena, as she was undoubtedly the first, was also his only wife; which is exclusive of the origin of Rusky, as Mr. Napier would inculcate, from a *supposed* younger son of Sir John whom he would identify with Sir Walter Menteith their ancestor. This Sir Walter, a cotemporary, who happened to be the son of another Sir John Menteith, was solely provided out of the estate of the Earl of Menteith, the head of the house, and not from that of Sir John Menteith *of Arran*, the husband of Elena,—inducing the obvious conclusion, that he was directly of the main stem. There is, however, another circumstance that clenches the point. The original grant of part of the Rusky estate to Sir Walter is still extant, with the ancient Rusky papers, in the Haldane charter chest (thus proving, as before stated, that the Haldanes were eldest portioners of Rusky), and although without date, bears to be granted by Murdoch, Earl

of Menteith, who died before 1333,¹ while it instructs that the disponsee *was a knight*.² Now, as it is fixed by entries in the Chamberlain Rolls, that Elena de Mar, who was niece of Robert the First's wife, was obtaining pensions and grants in 1329,³ she necessarily must have been then alive, which refutes the notion of there having been any second connection of her husband—at least (and this is all in which we are interested), that could have given birth to Sir Walter. It is quite evident that the latter must have been born long before, nay, in every probability, was major in 1329, which is obviously incompatible with the filiation. Any opening therefore to a Rusky descent, from “the maligned Knight,” upon which Mr. Napier once confidently founded, is more hermetically sealed up than ever. Consistent to the last in his affection for the weakest and most fragile evidence, he seeks to bolster up the “phantasy” P. 254. which he himself also rejects by Mr. Nimmo, the Rev. Mr. Macgregor Stirling, and a modern Peerage. These writers figure in our age, and while they adduce nothing certain or new, are frequently mistaken in many particulars. It is only necessary to cast a casual glance over their works, containing the

¹ Ford, Vol. II. p. 305 ; and Hailes' Ann. Vol. III. ps. 86—95.

² Mr. Napier does not give an accurate excerpt from the deed, probably not having seen the original, see p. 253 of his last performance.

³ See Chamberlain Rolls, Vol. I., ps. 24—25—95.

most glaring genealogical misconceptions, to ascertain what faith or credit is to be given them ; and, at any rate, under the circumstances, their single veto, even if much more admissible, would weigh as nothing in the face of the above evidence. As for the Peerage in question, the account there is quite gratuitous, and equally unsupported. Mr. Napier objects that the author in his criticisms and remarks has been unmindful of a legal pattern, whom he admires and venerates. How this is, it is indeed difficult to see. It is apprehended he has precisely acted as Lord Hailes would have done, only with this difference, that his Lordship would have used the genealogical scalping knife more truculently, and with far greater effect. How he would have probed the rottenness of the Luton-hoo descent, and its glaring fallacies and absurdities, as well as the supposed origin of the Napiers, and the other matters in the controversy ! As to the writer's facts and inferences being inaccurate, as the former would also inculcate, that remains to be proved, and while it is pretty obvious that such a charge relevantly applies to himself, his opponent must confess that, after the present exposition, he has little fear of its being instructed in his case.

We have at length done with this weary round of easy refutation ; there are other things that might be also noticed and refuted, but as they are of inferior consequence, and the public may be now induced to exclaim—*Ohe jam satis est !* they may be allowed to pass.

Some may be surprised that the author should have taken so much pains upon a subject comparatively insignificant, and possessing but little general interest. His chief motive was to assert the justice of his views against the bitter and hasty attacks of a mistaken antiquary, while he also brought into the controversy new and illustrative matter.

He may only add, that if additional and important evidence be recovered, he will ever be ready to resume the discussion, and candidly state his impressions and sentiments,—but, in the present state of things, as the points in question are conceived to be of easy solution, and obvious to most antiquaries, it may be unnecessary to do so. The author is also willing, if his opponent choose, to refer the matter to two of their legal brethren. In this way we might have the opinions of calm and impartial third parties, unwarping by prejudices from private impulses, or attachment to preconceived opinion. But, at the sametime, he must reserve the right to answer any misrepresentations, or errors in fact, that may be urged against him.

APPENDIX.

No. I.

NOTICES OF MARGARET DE LEVENAX, WIFE OF ROBERT MENTEITH
OF RUSKY—THE CURIOUS CASUALTY OF *MARITAGIUM*—AND PROOF
OF THE EARLY KUSKY DESCENT.

THE marriage of Margaret de Levenax, was probably shortly after the 25th of July 1392, for of that date there is in the Montrose charter chest, a settlement by Robert Menteith of Rusky, upon Margaret, daughter of Duncan, Earl of Lennox, in reference to their nuptials. She survived her husband, and long after the above date, on the 28th of April 1420, there is in the same repository, an instrument taken by the Earl, upon his requiring John Colquhoun of Luss to marry the lady, promising in that event to remit the avail of his marriage. Many such acts occur in our Records—and some not a little amusing, owing to the cool rejoinders of the vassal who was so honored. Grizzle Sempill, Lady Stenhouse, the Mistress of Hamilton, Archbishop of Saint Andrews, rather plain in her person, and somewhat advanced, besides extremely dissolute in her conduct, is thus proposed repeatedly, as a fitting companion to juvenile wards.¹ She was the

¹ This was a very obvious device on the part of the superior—offering one whom he knew the vassal would not take—in order to secure the double avail; analagous, under the new system of Church presentation in Scotland, to presenting an unpopular incumbent to a parish, (who, of course, would reject him,) that the patron might eventually have his own candidate.

daughter of Lord Sempill; and if the party offered was "in parage,"¹ and not "in *disparage*"²—whatever else she might be,—and the presentee refused, the superior or his assignee was entitled to a double avail, or payment. "*Blude*" and "*personage*," that is rank, and corporal sufficiency—and not fortune, were the proper qualifications.

This important privilege must have had its due influence upon the manners and bent of the age, for it was often assigned to a female who ingenuously offered herself, so that courtship was transferred to the weaker sex; and even vows of chastity, and blindness, that prevented inspection of the proposed match, did not exclude the "*single*," or ordinary avail. Early in the seventeenth century, Margaret Fairlie, a co-heiress, argued that "scho could not incur the doubill avail of hir marriage, becaus scho being blind, and not abill to discern the sufficeancie of the partie offered, hir friendis suld have bene requyred with hir to have comperit, and gevin their advice," a sensible suggestion, which was yet repelled by the Supreme Court. She was thus, if she accepted the matrimonial offer, to take a leap in the dark. The lady, however, was more successful in this plea before them, in which she concurred with "Janet who is blind, and ane uthir of the sisteris"—"that the *doubill* availl of thair mariage can not be discernit, becaus they not being meit for mariage, nor myndit to marie, they could not be compellit yerto, nather could they incur any penaltie, for not mareing, seing be the law of God, and law of man *cælibatus, et continentie votum*, ar lawful, and thairfor albeit the *singill* availl, of yer mariage *may be soght*, yet thar not accepting of the partie offered can not infer the dowbill availl, seeing they are resolved not to marie, and the doubill availl sould onlie be gevin, when the partie requyrit refussis the offer, and maries ane uthir partie,³ but thir parties ar content to find caution for the doubill availl of thair mariage, incaise they either marie, at any time heirafter, or defyte thair bodie"—which reason-

¹ Equal in rank.

² Unequal.

³ This confirms what the author previously maintained in the controversy.

ing was sustained. The Court also, in the course of the discussion, recognized this distinction, by no means in favour of these unfortunate females; "That because the woman to whom the pairtie wes offerit was blind, ther wes less reeson to require ane *landit* man to be offerit to hir, whilk the Lordis considerit to be trewe." From this it followed, that while no feudal proprietor was to be subjected to the degradation of having a blind wife, this secondary honor, however high and aristocratical, was to be consigned to a burges, a clerk of court, or city officary.

Margaret de Levenax Lady Rusky, against whom there is no imputation, may be well supposed to have lost her youthful attractions, and to have been a mature matron in the vale of years, when the stripling Laird of Luss, not without repugnance of course, was introduced to her as a helpmate. He was, however, providentially saved from the fate that awaited him, for under the description "*dilectissimæ sororis nostre germane Margarete uxoris quondam domini de Rusky*," she consents, in 1451, to a well known deed of Isabel Duchess of Albany, Countess of Lennox her sister, the original of which is in the archives of the college of Glasgow.

The line of Rusky, from Lennox downwards, can be explicitly instructed by evidence, which, though it would not be remarkable in England or other countries, is yet often unprecedented in Scotland. No where is ancestry more prized or paraded than with us, and yet in no country are the means of elucidating it so scanty. For this reason the relative evidence of the early Rusky descent from Lennox may be added.

Official testificate, dated at Down in Menteith, 24th of April 1446, by Alexander Narne of Sandfurde, "comptroller till our soverane, and bailze within ye lordship of Menteth," that he had infest "*Murdoch of Menteth, eldest son to umquhile Robert of Menteth of Rousky*," in "ye landis of Rousky, Thom ande Lanerky," lying within the said bailzery, in which Robert "deit last vestit, and seisit as of fee."¹ The lands have evidently been

¹ Haldane Charter Chest. This additionally proves that the ancient Rusky titles descended to the Haldanes evidently as the eldest Rusky co-

in non-entry. Special retour, 27th of April 1473, of Agnes Menteith as heir of *Murdoch* Menteith her father in half of the lands of Ardownane, with an allusion to Dame Christian Murreff her mother then dead.¹ This was Agnes, the Rusky co-heiress, wife of Haldane, whose family, and that of Merchiston, can be proved, by authentic deeds upon record, to have been co-heirs of Ardownane, which, along with the next authorities, identifies Murdoch Menteith of Ardownane, with Murdoch Menteith of Rusky.

Entry in an Exchequer roll between 21st July 1451 and 13th of July 1454, bearing that there is no charge for the rents "*terrarium tenandrie de deshier et twoier que Ardeunane nuncupatur in manibus Regis per mortem Mordaci de Menteith, in warda existentium, de tempore autem quo dicte terre, et alie terre per mortem ejusdem in warda extiterunt,*" &c.²

Special retour, 28th of April 1456, of Agnes Menteith as heir of the late *Patrick* Menteith *her brother* in Rusky, &c.³

Grant, 26th March 1455, to John Napier, apparent of Merchiston, of the *Maritagium*.—"Elizabeth de Menteth *filie quondam Murdaci de Menteth, ac sororis, et unius heredum quondam Patricii de Menteth de Rousky.*"⁴ And the whole is clenched by the respective services of the Haldanes and Napiers, after the middle of the fifteenth century, to Duncan Earl of Lennox, where their exact propinquity is set forth.

P. 21. parceners. Mr. Napier knights both Robert and Murdoch, but upon what authority, remains to be shewn. No one can blame him for inattention to his kindred, for he proceeds upon the principle of "*omnes honorifice memorans.*"

¹ Ibid.

² Upon Record.

³ Haldane Charter-chest.

⁴ Napier Charter-chest, see Mr. Napier's last work, p. 153.

No. II.

DECREET OF TRANSFERENCE IN 1562—" LERD GLENNEGAS
CONTRA LERD MERCHISTON," WITH FURTHER REMARKS.

" Transferris wyt consent of ye pertiis procuratoris under-writtin ane contract allegit, maid in presens of ye lordis of consale for ye tyme betuix umquhile Jhone halden of glennegas for himself, and umquhile James halden his sone and apperand air for ye tyme on yat ane pert, and umquhile Jhone naper of Merchamiston and elizabethe his spous on yat uyir pert, anent ye devision, depertesing, and deling of ye landis of Ruskie and lanerk wyt ye pertinentis betuix ye foirsaidis pertiis in yis maner, that is to say yat ye said umquhile Jhone halden consentit, grantit, and admittit yat ye said Jobne naper suld depert, devis, and deill ye foirsaidis landis in yis wise, in ye first yat ye said umquhile Jhone halden, and James his sone as ELDEST portioneris suld tak for yer *first chimmeis*¹ of *Rusky* ye place wytin ye loche of Rusky, and for ye place of ye landis of lanerik ye place and biggingis of lanerk, and yat ye said umquhile Jhone naper and Elizabet his spous to cheise uyir tua chimmeisse quheir it plesit yame wytin ye samin landis, and to tak ye bordland of Rusky for yer chimmeis gif yai pleise, and foryer suld devoid ye foirsaidis landis in tua evinlie pertis as yai best ma be depertit and devidit, as ye said contract allegit, insert and registrat in ye buikis of umquhile our soverane ladeis grandschiris consale, to have, and havand ye strenthe of ane decreit of ye lordis yerof for ye tyme of ye dait ye secund day of August, ye yeir of go J^m four hundred lxxxv yeris, at moir lenthe proportis, in Jhone haldane of glennegas, successor to ye said umquhile Jhone halden of glennegas and heretabill possessor of yat ane half of ye foirsaidis landis wyt ye pertinentis *active*, and in Archibald naper of Merchamstoune as air at ye leist successor to umquhile Jhone naper of Merchamstone and portioner and heretabell possessor of ye uyer half yer

¹ It need hardly be mentioned, that "chimmeis" or "chimmis," means a dwelling-house.

of *passive*, and decernis and ordainis siclike lettres to be direct at ye instance of ye said Jhone halden against ye said Archibald naper of Merchamiston for compelling of him to fulfil the forsaid contract and decreet in all points efter the tenor of ye samyn as myt or suld heife bene direct at ye instance of ye said umquhile Jhone halden agains ye said umquhile Jhone naper of Merchamstone for compelling of him to fulfill ye foirsaid contract and decreit efter ye forme and tenor yerofschewin and producit before ye saidis lordis. The said Jhone halden of glennegas compeirand be maister Alexander Mauchane his procurator, and ye said Archibald naper of Merchamston compeirand be master Jhone abircrumby his procurator, and yat lettres be direct to ye effect forsaide in forme as effeirs."¹

P. 125.

Mr. Napier lays great stress upon the word "allegit" before "maid" in the commencement, contending it only amounts to an *ex parte* assertion that a contract had been made, but not "produced" or "verified." From the tenor of the proceeding, and the previous arguments, this circumstance at the most would be insignificant, but he is not aware of the technical meaning of "allegit," of old. It generally meant *produced in evidence*, a signification even ascribed to it by Johnson in modern times;² and Spelman, if he had been consulted, would at once have obviated the objection, for he says that "*allegiare—idem est quod verificare—apud Juridicos.*" Hence, the learned gentleman is refuted on all hands.³ If the term denoted what he fancies, which, however, is clearly contradicted by the latter part of the decreet,⁴ the words to "haif bein," would have followed "allegit," which are wanting, and the only way of making sense of the passage, is to adject a comma after allegit—the meaning evidently being that a contract was legally produced "maid" at the date referred to. The same remarks apply to the subsequent insertion of the term before "insert."

¹ Register of Acts and Decrees of Council and Session, Vol. XXIV. p. 466.

² He renders "To allege—to produce, as an argument."

³ Sub voce *allegiare*.

⁴ It actually bears, that the contract was "*schewin and producit* before ye saidis Lordis."

A striking circumstance, not alluded to, transpires from the first and incomplete entry of the process in the record,—the order of the parties being reversed, and the laird of *Merchiston* pursuer, while Haldane (or Gleneagles) is only defender.¹ Hence, again, instead of detracting from the contract—the further legalising of which was the object of the decree—Napier is additionally proved to have been eager to enforce it. The fact is, the whole was an amicable transaction, both parties holding themselves equally bound by the deed, but more especially Napier. The defect, however, in his representation in the way noticed, has prevented him from being pursuer, or figuring *active*, which character has necessarily devolved upon Haldane, and been another motive, from considerations of form, for remodelling the action, and the later entry.

No. III.

LEGAL SIGNIFICATION OF “PRIMUS ET PRINCIPALIS” (CHIEF AND PRINCIPAL,) AND “PRINCIPAL”—TERMS APPLIED TO HALDEN IN REFERENCE TO HIS INTEREST IN THE LENNOX REPRESENTATION, AND ATTENDANT RIGHTS, (See ps. 42—3.²)

The words “Primus et Principalis” are with us technical, and employed to denote the eldest and chief representative of a family. In support of this, some authorities may be given.

¹ It begins as follows, “*Transferris ye contract and appunctment and decretit of ye lordis of counsell interponit yairto for ye tyme berand contend as fallowis. At Edinburgh, ye secund day of August, ye yer of god (1485) in presens of ye lordis of Counsale, &c. it is appunctit and glenne-finale endit betwixt Jhone halden of glennegas, &c. and Jhone naper, and elizabeth his spous, &c. anent ye devisioun and deling of ye landis of Ruske, &c.—In ye first that ye said Jhone halden and James his sone, eldest portioneris sall tak for yer first chimmeis of Ruske, ye place wytin ye loche of Ruske,*” &c.

² The Royal charter that has been alluded to, dated 23d of April 1473, grants to “John Haldane of Rusky, (*Gleneagles*) his part “totius et integri Comitatus de Levenax *tanquam primo et principali ejusdem*—cum tenentibus, et libere tenentium servitiis, cum jure Patronatus, et dona-

Reg. Sec.
Sig. Lib.
29.

The crown, on the fourth of January 1549, grants the ward of Gillecallum Macnele of gaeya to "Torkill Makneill, *chief* and *principal* of the *clan*, and *surname* of Maknelis." In much the same way Henry Lord Sinclair, the undoubted ELDEST *heir* of the Sinclairs, is designed in an Act of Parliament in 1488, "*Chieff of yat blude*."

Acts, Vol.
II. p. 213.

Act. Dom.
Con. et
Sess. vol.
42.

In 1567 Lord Lovat is described as "*chief and Principale*" of *his kin*, in letters of slains, where he figures as head of his family, and in that capacity is affected.

Gordon
Charter
Chest.

There is an original bond of manrent, dated Huntly, 27th of June 1568, by "Lauchlane Macintosh of Dunenachtane, *cheiff* and *principale* of *Clanquhdtane*," to George Earl of Huntly. According to Highland authorities, the family were only chiefs of Clanquhatten in the female line, and if so, this is a case substantially the same with that of Haldane, who held the Lennox pre-eminence exclusively through a female. It is also believed to be a new and original corroboration of the chieftain-

Halden
Charter
Chest.
Ibid.

tione Ecclesiarum," &c. Infestment followed on the 23d of April in the same year. The King, in the letters recalling and annulling Darnley's service in 1475, says, that by this charter and seisin, Halden, who "*ever clomit the said superiorite (of Lennox) be resoun of his spouse, optenit oure favouris tharto as principal*." And an inductive cause is "the possessione, and sesing gevin to the said Johne of Haldane *as principale* and the *richt* of the successione *pertaining to the said John's spouse*, UNDEMANDIT be *ony* of our lieges;"—while it further transpires, that Darnley "*offerit diverse times (to Haldane) contentationis before the Lordis of our Counsale, as for the principall superiorite of the said Erledome*." This, with the complete taciturnity of all manner of evidence, excludes the notion of any opposite claim by the Napiers, which is quite uninstructed by their advocate.

Ibid.

It is naturally argued for Agnes Menteith, Haldane's wife in the reasons of reduction of Darnley's unjust service,—along with the investiture, "*tamquam primo et principali*," &c. that she, as "*come of the eldest dochter of Erle Duncan*," was thereby prejudiced,—the service erroneously ascribing such descent to Darnley. But during this contest, the Napiers are uniformly recreant, and with much philosophy indeed, upon Mr. Napier's plea, apathetically look on, while a subject which, according to him, was their own, is torn to pieces by others.

cy of the Macintoshes in the character mentioned. Carpentier, it may be observed, renders "*capitalis*," "*primus et præcipuus*," and as *capitalis* is identified (as we have seen) with the paramount rights of the eldest co-heir, this interpretation may further illustrate the point.

Halden was besides "*Principal*" (*simply*) of Lennox, and that it expressed briefly the same thing is instructed by additional instances.

We have seen that Torkill Makneil, in 1549, was styled "*chief and principal of the clan and surname of Maknelis*," and this person, in 1552, is exclusively designated, like the former, "*Principal of ye Clan of Macknelis*." Act. Dom.
Con. et
Sess. Lib.
10.

"Johne Forrous sone and are to umquhile Williame Forrous," Patrick, Jane, and Elizabeth his brother and sisters, obtain, in 1542, from Patrick Cockburn of Newbiggin, acting for himself and his brothers, 900 merks in assithment and amends for the slaughter of the said deceased William, perpetrated by the Cockburns. Upon this a discharge, and condonation are granted by "me ye said *John (Forrous)* for myself, and as *principal of my kyne* of my fader syd;" and "ye selis of.....guthrie of yat ilk, William Ogill, and Patrik lauson" are appended as "ye remanent of *ye principallis* of ye foure branchis—of ye *kyn* and freyndis" of the Forrousses. The last mentioned by our practice had also an interest on such occasions. Same Record, under date 16th November 1542.

It may be observed, that in the noted competition for the Earldom of Menteith in the thirteenth century that has been noticed, during the whole course of the proceedings Walter Stuart, the husband of one of the two co-heiresses, is alone prominent, as if he, and not she, had been the heir—indeed there is hardly any mention of the latter, with whose Christian name and designation we are even unacquainted. This further instructs, that the wife's interests in these days were sunk in the husband, whose in fact they were, and has especial relation to a remark previously made in respect to Haldane. The same thing also held in the case of Sir William Comyn, the husband of the other Menteith co-heiress. The practice or legal fiction, if it may be so called,

obviated the consequences of the infraction upon the original spirit of the feudal system by female succession, the King, in this manner, having always a male vassal fit to discharge the duties and prerogatives connected with the fief.

No. IV.

NOTICES AND AUTHORITIES REGARDING MR. ROBERT MENTEITH,
EX-MINISTER OF DUDDINGSTONE, JESUIT, PUBLIC SECRETARY,
SIEUR DE SALMONET, CANON OF PARIS, HISTORIAN, &c. *See*
p. 75.

Historical
notes by
Mr. David
Simpson
Historio-
grapher of
Scotland.¹
M.S. Brit-
ish Mu-
seum.

"Upon the 13th of September 1633, the lewd lyfe, and sinful and most filthy presumption of Maister Robert Menteith, sone to Alexander Menteith, Merchant burges in Edinburghe, came to licht by falling with ane honorable Ladie Dame Annas Hepburn, dochter to the Laird of Wauchton, and spous to ane worthie and nobill man, Sir James Hamilton, son to Sir Thomas Hamilton, who was President of Scotland.² Treue it is the fairsaid Mr. Robert Menteith, was Minister in Duddingstone, where this noble woman was one of his parochineris, for sche dwelt in Priestfield. Her worthie husband being out of the countrie, he inticed this

¹ There is an appointment, dated 31st of July 1706, in his Majesty's State-paper office, in favor of Mr. David to be keeper of the Queen's Library in the Palace of Holyroodhouse, on account of "his singular degree of knowledge in the antiquities of her Majestie's said ancient Kingdome, and the history and genealogy of the private familys." It empowers him "to publish and emitt Historicall, and Genealogical accounts, &c.—for his better performance wherof, her Majestie doth recommend to her Clerk Register, and to all Noblemen, Magistrates, and Clerks of Royal Burroughs, Keepers of Publick and private Libraries, within the said Kingdome, to assist him with all materials in their respective custodies."—This favored individual is, besides, to have a yearly pension of eighty pounds.

² The first Earl of Haddington.

worthie and noble woman to * , and begat on her *two* * (*a blank children, whiche, when it came to his eares at his home coming, here in the original.)* it bred a great grief in his heart, and he persewd devorcement against hir, whiche he obtained, and sua put her away, who was the *maist beautiful woman that wes in our country*; and upon Monday being the last of October the yeare forsaid, the saide Mr. Robert Monteith was charged, at the Croce of Edinburghe to compeir, and answer to the lawes of the country, but did not appeir. The Lord forgive him, for he has been a great scandall to our kirk."

Grant 16th of November 1633, to George Douglass in the Reg. Sec. Canongate, and his heirs of the escheat of Mr. Robert Monteith, Sig. Lib. 104, p. 446. Minister at Duddingston, denounced rebel, 7th of October 1633, by letters of horning at the instance of Sir Thomas Hope of Craighall, advocat, "and of Sir James Hamilton of Priestfield, knight, as *informer* to his said hienes advocat," for not finding caution to compeir before the Justice Clerk, on the 7th of November, and underly the lawes "for the filthie, odious, and detestabill crymes of *double* adulterie, committit be the said Mr. Robert Monteith, with Dame Annas Hepburne, sumtyme spous to the said Sir James."

There is here a deep aggravation of the offence, as the crime of "double adultery," implies that both of the guilty parties were married.

Remission by Charles I., 26th of September 1635, 'Dominæ Ibid. Lib. Annæ hepburne filiæ legitime domini Patricii hepburn de Wauch- 106, p. 340, ton militis, pro suo fædo crimine adulterii per ipsam cum Magistro b. Roberto Monteith Ministro apud dudingston, commissio inmensibus aut eo-circa, anno domini 1632." It also bears that she had, with due contrition, "satisfied the church."

Adultery was then a capital offence, especially in the present circumstances. Mr. Wood, upon the authority of the Edinburgh parish registers, states, that Dame Anna had twins to her husband Vol. I. p. 660. on the 10th of July 1631, and as her *liaison*, with Monteith, the result of which was two other children, thus only began in 1632,

while he absconded in October 1633, the probability is that this prolific lady had again as productive a birth.

Scottstar-
bet's, Stag-
State, ps.
71-2.

"The first earl's¹ second son, Sir James (of Priestfield,) had no better success in his affairs; for in his absence in England with the duke his chief, his lady, the laird of Wauchtons daughter, was debauched, and got with child by Mr. Robert Monteith, *now a Jesuit in Paris*. The said Sir James had a considerable estate left him by his father, which is all sold and gone."

* See p.
75.

The Bore-brieve in 1648,* makes Alexander above mentioned, the father of Monteith, also "of Salmonet" with sufficient reason, as it was from him that this strangely exalted designation was derived.

We may next give the curious account by Joly of the celebrated escape of Cardinal Retz from Nantes in 1654, where the ex-pastor, now the "*Sieur de Salmonet*" and his gallant brother Patrick prominently figure.

"Toutes ces mesures prises (for his Eminence's escape) le cardinal de Retz fit venir le *Sieur Salmonet, pretre eccossais, homme savant et de merite*, qui demouroit avec lui depuis longtemps, et le *sieur Montet* son frere, qui depuis a été tue en Alsace, lieutenant-colonel du regiment eccossais de Duglas; le sieur de Boisguerin, (&c.) tous braves gens et fort resolu, auxquels il declara le dessein qu'il avoit de se sauver, les priant de faire tout ce que Joly leur diroit. Il repondirent tous a cette proposition avec de grandes expressions de joie et d'approbation, a' la réserve de Salmonet, quis'étant mis a pleurer, fit ce qu'il put pour detourner le cardinal de cette resolution, en lui représentant les suites fâcheuses qui pourroient en arriver. Cela fit impression sur l'esprit de son frere Montet, qui, quoique très-brave, se mit, aussi à faire des reflexions. Mais le cardinal les ayant écoutés froidement sans s'émouvoir et sans changer de sentiment, ils sortirent enfin tous, &c.,—Mais ce qui embarrassa le plus Joly et ceux qui attendoient avec lui, fut que le cardinal de Retz, intimidé au moment

¹ The Earl of Haddington.

de l'exécution par Salmonet qui étoit auprès de lui, ne se rendit sur la terrasse qu'un gros quart-d'heure après que l'horloge eut sonné ; et les remontrances de ce trembleur opérèrent si bien, que le Cardinal dit à Imbert d'aller dire à Joly de remettre la chose au lendemain." At last "Salmonet s'étant retiré au même temps pour aller continuer ses lamentations dans sa chambre," the Cardinal risked the attempt, Joly and Patrick Monteith preceding him to secure the gate of the suburbs. In the meantime, the Cardinal losing his presence of mind, and unable to manage his horse, fell to the ground, which collected a crowd, when the two first rushed forward armed with pistols "ecarter le peuple." Salmonet remained at Nantes. His timidity and repugnance, whether politic or not, afterwards served him in good stead, for being arrested owing to his supposed concern in the matter, he had, as Joly remarks, no difficulty in justifying himself because he had opposed the design.¹

During this critical emergency the other brother was very active. At one moment he supported the fainting cardinal, disabled from his fall, and parched with thirst though close to a river, in the burning centre of a hay-stack, where they were obliged to conceal themselves ;² at another, he was at Paris communicating the intelligence.³ It is amusing to contrast the accounts of the cardinal and Joly together, the former with the tone of a French man arrogating to himself a merit and heroism which is not altogether borne out by the latter.

The Sieur de Salmonet was canon of Paris, a preferment derived from Retz, who was first co-adjutor, and then actual archbishop of that see.⁴ His original depravity, and the facility with which he changed his principles and religion, becoming a bigotted zealot and stickler for his adopted church, seem the deepest stains in his character. With his country he had abjured all previous impressions, and it is observable that his history commences from the period that marked his exposure and turpitude. In other re-

¹ Memoires de Guy Joly, Edit. Petitot, ps. 310—11, *et seq.*

² Memoires de Retz. Vol. III. ps. 321—3.

³ Joly, p. 317.

⁴ Zedlerian Lexicon, Vol. XXXIII. p. 1078.

spects he was a person of merit, and is particularly famed for the purity and elegance of his French, unprecedented in the ease of a foreigner. The grandeur and taste of his eloquence in enforcing his jesuitical principles are striking.¹ The author is informed by high authority,² that evidence of the great esteem in which he was held by the most distinguished of his co-temporaries, is afforded by letters addressed to him by Balzac and Maresius.

The works of "Robert Mentet de Salmonet" are the following:—"Remonstrance tres humble faite au Serenissime Prince Charles II., Roy de la Grande Bretagne, sur la conjoncture presente des affaires de sa Majeste," Paris 1652,—and "Histoire des troubles de la Grande Bretagne depuis l'an, 1633, jusque au 1649—Paris, 1661." Both have the *imprimatur* of Cardinal Retz.

Salmonet may have been alive in 1575, the period of the death of his brother Patrick in France, whose will is upon record.³ Under the designation of Sir Patrick Menteith (having been knighted) he leaves, partly out of sums due to him by Lord Douglas, and the officers of his regiment, one thousand pounds to the canon at Paris,⁴—the former, it is presumed, besides legacies to the Scots colleges at Paris and Douay, and "the poor English, recollects" there, with special injunction if his "*bore-brieve* and uyer commissiones, in France and England" "come" to "hand," they shall "be given to my broyer or his son Mr. Robert." Sir Patrick was a brave soldier, and a charitable and good papist, in all likelihood a proselyte of Salmonet, a very serviceable member of the church of Scotland.

¹ See the "*Remonstrance*," &c.

² Sir William Hamilton, Baronet.

³ In the Testamentary Register of the Commissary Court of Edinburgh.

⁴ He makes this legacy after alluding to papers or vouchers, "at Paris in Mo. Can. his hands," including a benefaction to poor Catholics. The orthography of the deed is bad, so it is conceived that the above words, evidently contractions, denote "Monsieur Canoine."

VINDICATION OF THE ORIGINALITY OF FACTS
AND ARGUMENTS OF THE AUTHOR IN THE CON-
TROVERSY REGARDING RICHARD II., AGAINST
AN ATTACK IN THE GENTLEMAN'S MAGAZINE.

IN a review of the Author's late reply to Mr. Tytler's Historical Remarks on the death of Richard II., in the Gentleman's Magazine for July, certain facts and circumstances there noticed, are represented as having been originally adduced by Mr. Amyot in the controversy.¹

These are—the public exposure of Richard's body,—its subsequent removal from Langley, and interment at Westminster Abbey by Henry V.—the marriage of Isabella, Richard's queen, to the Duke of Orleans—"the slight feeling excited in the country (England) during the greater portion of the supposed Richard's long residence in Scotland, a period of no less than nineteen years"—the insufficiency of the entries in the Chamberlain accounts regarding the pseudo-Richard to instruct the survival of the real one—and "considerations arising out of the politics, and situation of the Courts of England and Scotland," in so far as they involve the notion of Richard being kept in captivity from a conceived

¹ See ps. 55—6, &c.

policy or understanding between Henry IV. and Albany, and the little offensive use, if any, made of his counterpart by the Scottish Court.¹

Stress is also laid by the reviewer upon the remark of Sir James Macintosh in his History of England, in reference to Isabella's marriage, that it "affords a tolerable presumption that her family had sufficient assurance of Richard's death," which is embodied by Mr. Amyot.

As if he had not, however, done enough for that gentleman, he even goes further, and makes him the first impugner of Mr. Tytler by the aid of the above particulars, and the first to whom the credit is due of having refuted him. Upon this hypothesis he also charges the author, who claims the priority in these respects, with assuming a right inherent in Mr. Amyot, and having committed withal "no trifling injustice" by "*interfering with the merits of preceding writers.*"

Nothing certainly is more easy than to answer such accusations, which is at once done by the statement of a few facts.

The medium through which Mr. Amyot favored the public with his lucubrations, is a paper referred to by the reviewer in the 23d volume of the *Archæologia*, which is dated the 22d of November 1830.²

¹ See Mr. Amyot's paper (to be afterwards noticed) in the *Archæologia*, Vol. XXIII. ps. 282—5—6, 95, &c.

² See *Archæologia*, *ut supra*, p. 277.

Sir James Macintosh, who is also supposed to have preceded the author in the discussion, only published his remarks in the same year.¹ But it so happens that *all that has been noticed*, and asserted to have first emanated from these personages, *is to be found in communications of the Author* to the Edinburgh Caledonian Mercury for *July and August 1829*—that is *several months before* Sir James wrote, and *more than a year before* Mr. Amyot's paper. It may be further observed, that he *immediately* closed with Mr. Tytler upon the first intimation of his alleged discovery of Richard's survival in a short paragraph in the above print, where it was simply announced by him without condescending upon facts or evidence.² The communications to the Caledonian Mercury are subjoined to this article, with relative excerpts shewing the nature and origin of the discussion.³ The Author not only upon this occasion stated his sentiments against Mr. Tytler's supposition, but moreover, the material part of his theory as to the pseudo-Richard being Thomas Warde of Trumpington—a subject which the writer in the Gentleman's Magazine admits "was not treated by Mr. Amyot."⁴ In this was included the supposed origin of the delusion, the

¹ Proved by the date of the first edition of his History of England, where they are contained.

² Under date 16th July 1829, see No. I. of annexed excerpts, and No II. (dated July 20th same year,) *ibid*.

³ Nos. I. II. III. IV. and V.

⁴ Mag. p. 56.

practices, and career of Serle, &c., which are alone insisted upon by the author.¹

Neither Sir James Macintosh, or either of the other gentlemen, having *then* published their remarks, for Mr. Tytler did not produce his Dissertation until the 22d of December 1829,²—it is submitted, that the claim of the author to complete originality—and being the earliest broacher of the merits of the controversy—as well as first assailant of the latter, is undeniable. Eventually, after the lapse of some years, he embodied, at greater length, his previous speculations, with other facts and illustrations³ in his second Reply to Mr. Tytler.

The reviewer sagely inculcates, that the first duty of an author is to ascertain what had been previously written upon the subjects of which he treats. Agreeably, then, to this principle, he should have perused his opponent's communications to the *Mercury*, which are expressly referred to in the very paper he criticises.⁴

The writer may here mention, that he was utterly ignorant of the existence of Mr. Amyot's production until the date of the review, and it was not

¹ See No. V. of the Excerpts.

² The year of the Publication is 1829, and the author ascertained the precise date from the publishers.

³ See Tracts, &c., p. 3, et seq. Among these, as not being of the first importance, he did not include the fact of the re-interment of Richard II. by Henry V. at Westminster, though previously founded upon.

⁴ See Tracts, &c., p. 3.

without much difficulty that he succeeded in obtaining a perusal—the volume of the *Archæologia*, (a work little in general circulation), where it is inserted, being, by some strange accident, in none of the public libraries of Edinburgh. As might naturally be expected, Mr. Amyot and he, *inter alia*, have both founded upon some facts, among which are the execution of Maudelain, and the letter of the Primate Arundel to Henry IV. These were truly discoveries of the last, as well as of the former, in the same way as some of his arguments had been previously broached by the author. The consequences arising from the first of these events are so obvious, as hardly likely to escape any one who had lighted upon the circumstance; and it is observable, that although Mr. Amyot does adduce the letter in question, the striking intimations there of the impostor having been a “*fool*,”¹ and “*famulus*,” identifying him with Warde, and going to connect him exclusively, by means of the writer’s proof, with the royal household, are passed unheeded. But, independently of this, as will be seen upon the most casual glance, there are various illustrations and facts in the author’s second Reply to Mr. Tytler never urged except by himself, among which are the notice of Warde, with the grant of his escheat in 1409, the curious representation of the Privy Council to Henry IV. in 1400,

¹ *Fatum.*

the significant explanation in the Chamberlain Rolls in 1407,¹ comparative treatment of James I. and the Scottish Richard, &c. &c., besides the theory as to Serle, including the remarkable silence as to the former until 1402, when the conceived plot is first heard of, &c.

The writer in the magazine warmly identifies himself with the interests of Mr. Tytler, and his object apparently is, to extol him to the complete prostration of his opponent. Mr. Tytler not being personally in the field, it might be improper to expatiate upon his merits, and it is perhaps unnecessary to allude to the incident, or the intemperate tone of his champion, coming as they do from an anonymous quarter. Of the History by that gentleman, however, which is greatly lauded, the author may yet add, that he conceives he has formed a proper estimate, as he may perhaps shew upon some future occasion. In the mean time, he must deprecate his rash vituperation of Lord Hailes,² our

¹ See quotation in the Tracts, p. 90.

Hist. Vol.
I. p. 438.

² Mr. Tytler says, "with a *constant affectation* of superiority to all national prejudices, and an *assumption* of hypercritical accuracy in all his details, I have found *many portions* of Lord Hailes' History, when examined by the original authorities, *highly partial, vague, and inaccurate.*" What Scottish antiquary will he find to agree with him here? Again he asserts, "I have elsewhere observed, that Lord Hailes is *fond* of displaying his *ingenuity* in *white-washing dubious characters*, and that with an *appearance* of hypercritical accuracy in his remarks upon other historians, *he is often glaringly inaccurate himself.*" This is

Ibid. p.
443.

first antiquary, whom most Scotsmen would not wrecklessly attack. He is immeasurably before his fellow-labourers in the path of early criticism and history, and has fixed a standard, which, however irksome and grating it may be to some, is peculiarly demanded in the *unweeded* department of Scottish antiquities.

An acrimonious feeling to Lord Hailes seems to burn through all the early part of Mr. Tytler's work,—and is even displayed in trifles, and capitious, and unfounded objections. For instance his Lordship, upon good authority, calls John Russel, who married the Countess of Menteith in 1258, “an obscure Englishman.”¹ Here his opponent attempts to convict him of error, but upon what ground, merely because there was a John Russel long previously, in 1220, who was guarantee in an English deed of Henry III., relative to the marriage of Joanna, his sister, with Alexander II.² This certainly is most cogent reasoning. He might as well, and indeed better, argue against the conclusion, because there was a John Russel, constable of Corff

rather too much indeed. Mr. Napier, with whom the author is here happy to coincide, much to his credit, has warmly and successfully commented upon these disrespectful, and, as it is conceived, most unauthorised reflections. See *Memoirs of Merchiston*, p. 528—9, &c.

¹ Ann. Vol. I. p. 189, referring to Fordun, Vol. II. p. 92. *Edit. Goodall*, who styles Russel, “cuidam ignobili militi Angligenæ.”

² Hist. Vol. I. p. 20.

Castle in 1221,¹—a John Russel, sheriff of Somersetshire in 1222,²—and a John Russel, ranger of the forest of Clarendon in 1275.³ John Russels then, as now, were pretty numerous, yet Mr. Tytler's argument would go, without respect to their comparative merits, to make them all identities. At another time, because the *noble* Countess of Buchan, sister of the Earl of Fife, and the nearest representative of his family in Scotland, was eager to exercise their proud hereditary privilege of crowning the Kings of Scotland in the case of Bruce—animated besides by the most patriotic feeling—he would maintain against Lord Hailes, who is so bold as to reject the discreditable imputation, resting only upon *English* scandal, that she had a criminal affection for the Monarch.⁴

On the faith of a deed in 1286, noticed in Dugdale's baronage, Mr. Tytler thinks he has established the fact of “an *important convention*” as he calls it, which according to him took place at that time, and, as he confidently maintains, has “*escaped* Lord Hailes.” He besides argues from it, that there was then “a *strong party* against *her* (*the Maid* of Norway) amongst the most powerful of

¹ Claus. Rot. 5, Hen. III.

² Rot. Pat. 7. Hen. III.

³ Abbreviat. Rot, orig. Sacc. 3 Ed. I.

⁴ Hist. Vol. I. ps. 450—1. Lord Hailes most pertinently remarks, “Such idle stories are always circulated in times of public disorder.” Ann. Vol. II. p. 2. The English might justly be expected to heap every kind of abuse against the lady.

the Scottish Barons.”¹ The author has a full copy of the deed from the British Museum, and it instructs no such thing. It is simply a bond of manrent (common in early times) by Patrick Earl of Dunbar, the Earl of Menteith, the Bruces, and a few more Scottish chieftains, to Richard de Burgh, Earl of Ulster, and Thomas de Clare, Englishmen, exclusively binding themselves to support the two last “in *omnibus negotiis suis*—contra omnes mortales” with the *usual reservation* of the King of England’s allegiance, and “*illius qui regnum Scotie ratione sanguinis felicitis recordationis domini Alexandri Regis Scotie qui ultimo obiit adipisceretur.*”²—The lawful heir to the Scottish crown is here generally denoted. The words obviously imply the individual who shall possess that character, “qui”—supposing there be here grammatical precision—being used in the same way as “mankind” in a broad sense, and comprehending females as well as males. It is to be remembered too, that this was at the very period of the accession of the Maid of Norway, when (especially in such an age) different notions might be entertained as to the true succession, which further may account for the generality of the language. Mr. Tytler as erroneously asserts, that these Scottish and English Barons bind themselves

¹ Hist. Vol. I. ps. 64—5.

² “Salva fide domini Regis Anglie, et salva fide illius qui regnum Scotie ratione sanguinis,” &c. &c.

to support "*one another* ;" on the contrary, the Scots are *only to be subservient to the English*, and they are taken to be so in a most effectual manner.¹

There having thence been no such "important convention," or necessarily hostile act, as the former supposes, it most justly has escaped Lord Hailes, who had the misfortune not to see what never occurred, —though for this he is unduly reflected upon. Mr. Tytler also strangely infers from the same authority, that there was a party at the time for Bruce, whom there might be a design to raise to the throne, but how can this be, independently of what has been shewn, when not only all the Scottish Chieftains, but even Bruce himself and his two sons, expressly own themselves, as proved by the deed, in allegiance to another? Besides, such irrelevant conclusion is refuted by the words of the deed itself, the allegiance being reserved to the heir to the crown, *ratione sanguinis*, which Bruce assuredly was not. No apology, it is conceived, is necessary for these remarks, that defend an excellent and acute person against a charge of unfounded inadvertency and error.

Mr. Amyot has fallen into an obvious misapprehension, natural enough in an Englishman, regarding "*Johannes de Insulis de Dunwage, et de*

¹ A literal transcript of the deed, which is properly entitled, "*affidatio Scotorum*," expressive of a bond of fealty, or manrent by them, now for the first time adduced, is inserted immediately after the excerpts from the Caledonian Mercury.

Glynnis," a younger son of the family of the Isles, from whom the Irish House of Antrim is descended. He partly concludes from the latter being designed "*de Insulis*," that he may have been Lord of the Isles;¹ but this is an erroneous inference, and it is fully proved by our records, that the younger branches of this race, as well as their head, had the designation *de Insulis*.

Connected with them, there is important evidence lately published in an official shape, that bears upon their male representation, and much to the advantage of the "Dunwage or Glynnis" line.

After the death of Donald of the Isles, styled "Earl of Ross, Lord of the Isles,"² natural son of Angus of the Isles, also natural son of John Earl of Ross, and Lord of the Isles, (but which *Angus* had been secured in the succession to the Isles by a *nominatim* conveyance,³) "James

See afterwards.

¹ Archæologia, *ut supra*, p. 281.

² In the Highlands it was no uncommon thing for bastards to succeed, agreeably to the law of Tanistry, by the election of the clan, when they were most frequently designed Captains, though occasionally chiefs.

³ Anno 1476. Reg. Mag. Sig. Lib. vii. No. 335. It carried the Isles only. John the father had lost the Earldom of Ross by previous forfeiture. The following new authority in 1493, shews the way in which the Crown obtained possession of the Isles. Instrument 2d of January 1493, setting forth that "Johannes olim dominus de Ilis—accessit ad presentiam supremi domini nostri Regis Jacobi quarti, &c.—reverentia qua decuit flexis genibus, &c.—et sursum resignavit, &c. *totum dominium de Ilis cum tenentibus—pro se et heredibus suis—in favorem dicti nos-*

Act. Dom. Con. of that date.

M'Connail¹ of Dunnewaik and ye Glinnis," in 1546, as "*aperand aeyir of ye Ylis*," binds himself and "*his'awine surname*—both North and South," as well as the "Clanronald," to support the interest of Henry VIII. In a letter at the same time from the Lord Deputy of Ireland to the Privy Council of England, it is stated that the former "nowe declar-eth hymself Lord of the Isles by the consent of the Nobilitie of the insulans," and further in another in 1545, by Ewyne Allane of Lochield, one of "the gentilmen of the Ilis," (ancestor of the Camerons of Lochiel) it is affirmed that "*the said Lord James* is worthy to succeed to the Isles, for he is one fowrthe young man at (*that*) hes good bretheryne of his awyne, and *grete kyne*, and friendis, and NARREST *of heir* to THE HOUSE of the Islis."²

The family, though powerful and opulent, have

tri Regis,"—in presence of the Court, &c. John probably repudiated this transaction, as from records he appears to have been afterwards forfeited.

¹ The patronimic M'Connell, the same as Macdonel, or Macdonald, became, as in many other cases, a surname in the house of the Isles. There was much diversity in the North, in respect to surnames, owing to the selection occasionally of mutable patronimics, after noted ancestors—thus, there is *Duncanson*, as well as Robertson of Strowan; and *Allanson*, and *Donaldson*, (or Macdonald,) as well as Cameron, of Lochiel, the last the ancient surname, &c.

² The above documents are among the State Papers, published under authority of his Majesty's Commission, relative to England and Ireland, in 1834. Pp. 548—9.

been overlooked in the discussions that have occurred as to the male chieftancy of the Macdonalds. They possessed among other lands, the Glinns, and Glenarm in Ireland, with the Island of Raglin on the contiguous coast, which led to the introduction of the branch of Antrim. Raglin formerly was a debateable possession, held by some to be a portion of Scotland, and described in Scottish deeds as in Kintyre, upon which subject, and other relative ones, more could be offered had there been limits at present.

Some curious particulars transpire in the previous State Papers, as to Donald of the Isles, Earl of Ross, &c.—the *Bastard* as is conceived above mentioned,—“a great Capitayne of the wylde Scottis”—that he was styled Earl of Ross, and Lord of the Isles—that he was a mortal enemy of the Earl of Argyle,—that he had been kept in prison for thirty years by James V., (who massacred his father,) but since his death had become of “greate power,”—and finally, that he died some time between the 5th of August 1545, and the 24th of January 1546.¹ “Donald of the Isles,” is proved by the Acts of Parliament, previously to have excited a rebellion in 1503 and 1505—when he usurped the title of Lord of the Isles ;² and the subsequent silence as to him may be explained by his last imprisonment. Mr. Tytler represents *Donald Du*,—the same with the

¹ See Vol. III. pp. 518—31—48.

² Vol. II. pp. 247, 263.

Donald in 1505, and undoubted bastard son of Angus, bastard son of John Earl of Ross—as having been “*aged*” in 1505, and to have *died* “soon after.”¹ But, in the first place, he could not have been so, but must have been young at the time, because it is instructed by an authentic document in 1456, that John Earl of Ross his *grandfather*, was merely then approaching majority, and could only have been between fifty and sixty in 1493, when he resigned the Isles. And, in the second place, Mr. Tytler does not adduce any evidence in support of the alleged death shortly after 1505. On the other hand there is testimony against it.

In the negotiations between Henry VIII., and Donald Earl of Ross, &c. in 1545,—which are to be found in the State Papers, Matthew Earl of Lennox, married to his niece, bears a prominent part, being in fact the principal director of the then projected attempt against Scotland, through the agency of the Laird of Maclean, his brother, and others,²—now we have the following striking accounts, from the curious Gaelic fragment published by Sir Walter Scott in his Notes to the Lord of the Isles.³

“*Donald Du, son of Angus, (the bastard) son of John of the Isles (Earl of Ross,) &c. namely the*

¹ Hist. Vol. V. pp. 32, 21. Donald Du, or of the Isles, in 1505, is as clearly the son of Angus the bastard, son of John Earl of Ross, Lord of the Isles.

² *Ut supra*, pp. 523–4–9–34, 531–3, &c.

³ Canto I. p. xix. *et seq.*

true heir of the *Isles, and Ross*, came *after his release from captivity* to the Isles, and convened the men thereof, and he, and the *Earl of Lennox* agreed to raise a great army for the purpose of taking possession, and a ship came *from England* with a supply of money to carry on the war, which landed at Mull, and the money was given to *Macleane of Duart*,¹ to be distributed among the commanders of the army, which they not receiving in proportion as it should have been distributed among them, caused the army to disperse, which, when the Earl of Lennox heard, he disbanded his own men, &c.—Macdonald went to Ireland to raise men, but he died on his way to Dublin, at Drogheda, of a fever, without issue of either sons or daughters.”

Hence Donald Du is shewn to have been alive in 1545, the date of the transaction in question, and the same with Donald Earl of Ross, &c. It is admitted that we are descending to a lesser kind of evidence, yet it is far better than the unsupported assumption of Mr. Tytler, while it is singular how much it tallies with the regular proof in the State Papers. We further learn, in accordance with the latter, that the father of Donald (*Angus*) had been murdered.—Donald, *de facto*, was the nearest heir of Ross and the Isles, and possibly the proper heir, according to Gaelic notions, which

¹ This family, as is well known, have been held to be chiefs of the Macleans—they would thus be lairds of Maclean.

were different from those in the Lowlands. Upon his death without issue, the male representation would necessarily go to collaterals, of which class was James M'Connell of Dunwage, through Alexander his father, descended from John "de Insulis," alluded to by Mr. Amyot, younger brother of Donald, father of John last Earl of Ross, who was forfeited.

Of Donald, the last titular Earl of Ross, and Lord of the Isles, it may be only added, that it is proved by the State Papers, that he left a "base son," whom, as "the *Lorde Elect* of the same Isles (*James of Dunwaige*)—affirmeth, his saide faider in his extremes, bequeathed to the Kingis Majestie, and to serve his Highness accordingly."¹ Donald the father is also proved to have died, a "trew and constand servand, and subject "to the English King,"² while the new Lord Elect, and the brother of the Laird of Maclean, still remained at Dublin at his Majesty's charges in 1545.³

¹ Letter dated 25th February 1545. Vol. III. p. 553.

² Ibid. p. 567.

³ Ibid. p. 553.

EXCERPTS FROM THE CALEDONIAN MERCURY IN JULY
AND AUGUST 1829, IN REFERENCE TO THE DISCUS-
SION REGARDING RICHARD II., CONTAINING THE
COMMUNICATIONS OF THE AUTHOR, &c.

No. I.

(*Thursday, July 16th 1829.*)

FIRST PUBLIC INTIMATION BY MR. TYTLER, OF HIS SUPPOSED
DISCOVERY IN THE MATTER, DATED 16TH OF JULY IN THE
ABOVE YEAR.

A DISCOVERY has been made by Mr. Tytler, in the course of his researches, regarding the fate of Richard the Second, who is commonly supposed to have been murdered in Pontefract Castle by the orders of Henry IV., in 1399. It is well known, however, that the greatest obscurity hung over the reported manner of his death, and that Henry's reign was disturbed by perpetual reports of his being alive, which by all future historians, both English and Scottish, have been regarded as fabulous. The existence, however, of Richard in Scotland, for a long period of years after his reputed death in England, can be established by Mr. Tytler, by documents whose authority is incontestible, and which are now for the first time to be published to the world.

No. II.

LETTER OF THE AUTHOR, IN ANSWER, ADDRESSED TO THE EDITOR
OF THE CALEDONIAN MERCURY, DATED JULY 20TH SAME YEAR.

TO THE EDITOR OF THE CALEDONIAN MERCURY.

SIR,

I observe it stated in your *last paper*,¹ that Mr. Tytler has discovered incontestible proof, now for the first time to be published, of Richard II. having been in Scotland after the date of his asserted demise, and that too contrary to the representations (*which may be questioned*) of all our writers, who it seems were misled in the matter. If Mr. Tytler can authenticate the fact by any thing, *excepting certain payments in the Scottish Exchequer Rolls*² *at the beginning of the 15th century*, to one on whom the Royal Title was lavished by the Scottish Government, as on other English Pretenders,—statements and conjectures of historians, and one or two more analogous authorities—he would indeed furnish a valuable addition to our stock of historical knowledge. The previous information, however, *which I fear is inconclusive*, has long been known, *at least to some antiquarians*; and, with all submission,

[¹ There is here a slight error in the reference, owing to the non-insertion of the communication till a day later than was intended.]

² These items, indeed, which have even been printed, are perhaps curious. They are for the sustenance of Richard, who is there styled “Richard King of England,” in the same way probably as Perkin Warbeck, “Duke of York,” in another portion of our Records—from the obvious and politic motive, as apprehended, of throwing obstacles and perplexities in the way of the English succession.

[This is the *first* public allusion to the Exchequer or Chamberlain Rolls, regarding the pseudo-Richard, which, as mentioned in his Tracts, had been shewn the author many years before the period in question, by Thomas Thomson, Esq., the Clerk Register.]

I cannot but entertain great doubts as to the existence of more of importance upon the subject.—On the contrary supposition, a very sensible favour certainly would be done by communication of the particulars. I need hardly add, that the rumour of Richard having been in Scotland at the time mentioned is noticed by several former historians, and there are other authorities, whether known or not, to the same effect.

I remain your obedient servant,

J. R.

No. III.

OTHER LETTER FROM THE SAME TO THE SAME, DATED JULY 30TH
DITTO, WITH PREFACE BY EDITOR.

THE following communication, in reference to the supposed discovery of Mr. Tytler, merits the attention of the public in general, and of that gentleman in particular. It is from the pen of one of the most learned, profound, and, we ought to add, unpretending of modern antiquarians, whose views on any subject connected with the ancient history of Scotland, are entitled to peculiar consideration, and whose opinions in regard to the question which Mr. Tytler has raised, are not only ingenious in themselves, but in perfect unison with the conviction expressed by all preceding historians. At the same time, we are free to confess, that when Mr. Tytler did us the honour to explain to us the grounds upon which he had been led to call in question the commonly received opinion respecting the time, place, and manner of Richard's death, the chain of evidence, or, at least, of probabilities, seemed so remarkably entire, and the theory or hypothesis of his escape into, and residence in Scotland, appears to account so satisfactorily for many circumstances which historians had left unexplained, that we were powerfully struck with the exposition of our learned friend, and strongly inclined to believe he had made

out his case, or at least adduced such a number of coincident and corroborative particulars as amounted to a very high degree of probability. This casual, and, it may be, hasty impression, however, is not to be weighed against the deliberate opinion of a man like our correspondent, who is so eminently qualified to discuss the *quaestiones vexatas* of historical antiquity; and therefore we submit his communication to our readers, in the hope that it may contribute towards the settling, one way or other, of a point of no inconsiderable interest in itself, and of great importance with reference both to the Scottish and English history of the period immediately succeeding the supposed murder of Richard in Pomfret Castle.

“ Permit me to observe, in reference to the subject of Richard II., lately started in your paper, it is an error to suppose, as contended, that the story of Richard’s escape and demise in Scotland was accounted fabulous “by all future historians.” Independently of other authorities, both are expressly mentioned and credited by Ballenden, who, we know, wrote early in the sixteenth century. Nor, whatever doubt may be entertained, can it, I humbly think, be asserted that the statement transmitted by Ballenden and his successors, is to be received as incontestible. *Many circumstances seem to militate against its veracity*; the peremptory denial of English historians, that Richard died in Scotland—the *public exposure of his face in his coffin for three days at London after the event* in “the bloody tower,” (a name it retained) of Pomfret, the rest of his person being wisely enough concealed—Richard’s burial at Langley, *excavation, and solemn interment by Henry V. at Westminster in 1413—not to add the marriage of his Queen to Charles of Orleans, a French Prince of the blood, shortly after the catastrophe*; and if we believe Ballenden, &c. long before his asserted decease in Scotland,¹ a country in alliance with France, and between whom there was direct intercourse.—*Here it may be remarked in what strange predica-*

¹ Richard’s widow died the wife of Charles, in 1409.—*Vide Tableaux Généalogiques de la Maison Royale de France par P. Labbé 1651—and in the Exchequer Rolls of Scotland, the “expences” of Richard King of England” are charged against the Government down to the year 1417, inclusive.*

ment the issue of Charles and the Queen had been placed,¹ admitting the latter event ; nor were the French inclined hastily to credit Richard's death, which, indeed, they highly resented, as might be expected from the Princess being daughter of their Sovereign. While it was the interest and practice of Scotland, actively to back every English pretender, she never lent such assistance to the supposed Richard, or for one moment ventured his person beyond the border to cheer his English friends, or in hostile guise, to vindicate his claim. The reason seems obvious ; by so acting, she would at once have exposed the deception, which required for its success, to be cautiously and delicately managed ; and, accordingly, we find from Winton, that this apparition was kept in constant captivity—passing through the custody of the “ Lord of Montgomery,” the Lord of Cumbernald,” and, finally, of Albany—Scotland merely availing herself of the “ *nominis umbra*,” which was even something in these days. This very phantom, who was perhaps some wretched maniac ; when asked if he were King Richard, according to Winton, denied it, and the same Winton, a respectable authority, a Scotchman, and what is more, a cotemporary, thus doubts of his identity—

‘ Quheyer he had been King, or nane,
 ‘ Thare wes bot few yat wyst certane.
 ‘ Of Devotione nane he wes,
 ‘ And seildyn will had to here Mes :
 ‘ As he bare hym, lyk wes he,
 ‘ Oft half wod or wyld to be.’

“ On these grounds, and all know how often on such occasions impostors figure in history, *I conceive I am fully justified in withholding my belief from the proposition made in your paper*, of there being incontestible proof that the Scottish Richard was the English Richard. But, while I go this length, I am not disposed to affirm that the point is wholly unattended with dubiety. It is certain that the former was alimmented by the Scottish Government, and, in some degree, like Perkin Warbeck, recognised

¹ [See Mr. Amyot's Paper, *Archæologia*, *ut supra*, p. 294.]

as King of England; that he died in Scotland, and was buried near the altar of the Church of the Blackfriars, in Stirling, under a monument *inscribed with Latin verses, as we learn from an ancient Chronicle*.¹ Nor can it be disputed, that the story of Richard the Second's escape and existence in Scotland, though possibly transpiring from the latter country, was partially retailed in England."

J. R.

No. IV.

COMMUNICATION FROM MR. TYTLER, DATED AUGUST 1ST, DITTO.

MR. TYTLER requests us to state, that in not replying to the communication of our correspondent Mr Riddell, he is actuated solely by a desire not to enter prematurely into the merits of a question which may hereafter be discussed with more propriety, as well as greater usefulness of information. The third volume of his History of Scotland will, it is expected, be published in November, and, appended thereto, will be given a full enumeration of the proofs upon which he ventures to dispute the truth of the commonly received story of Richard's death in England. When this takes place, it will afford Mr. Tytler great pleasure to hear, and to attempt to answer any observations from so learned an antiquary as Mr. Riddell, to whose researches he acknowledges himself to have already been under repeated obligations.

¹ [This is the Manuscript in the Advocates' Library,—where the Latin inscription upon his tomb is alone to be found.]

No. V.

LAST LETTER FROM THE AUTHOR TO THE EDITOR OF THE CALEDONIAN MERCURY, DATED AUGUST 13TH IN THE SAME YEAR, WITH PREFACE BY EDITOR.

THE same learned and ingenious antiquary, who lately contested, in our columns, the truth of Mr. Tytler's hypothesis respecting the appearance of Richard the Second in Scotland, after the period of his alleged murder in Pomfret Castle, has transmitted to us the following communication, unfolding a new theory on the subject, with the view of accounting for those circumstances which have made so strong an impression on the mind of Mr. Tytler. This paper we regard as equally curious and important.

"I have still one or two remarks connected with Richard II., the chief apology for which is, that they involve a new speculation, and may possibly tend—(especially from their statement at the present moment)—to elucidate the question affecting him.

"It appears that one Serle, a yeoman of the Guard, 'Cubicularius,' and creature of Richard II., was main instrument in the wanton murder of the Duke of Gloucester, perpetrated by order of that monarch. Immediately on the accession of Henry IV., Hall, another accomplice, was tried and executed for his share in the same crime. Serle, however, who had been implicated by Hall, fled the country; and the next action we learn of this villain—likely enough to strain at some desperate expedient for retrieving his fortune—is his attempt, by means of letters impressed with Richard's signet, which he had either stolen or forged, and written from Scotland—to persuade persons in England that Richard was still alive in the former realm, and about to proceed to England in vindication of his rights. From Serle's character and previous opportunities, it may be easy to account for the tem-

porary success of the deception, which old authorities expressly affirm he made a full avowal of previous to his death. The letters appear to have been written in 1402, the time when we first hear of the supposed Richard in Scotland; and it singularly enough happens that less than a year or two afterwards, in a pardon granted by Henry IV., generally to traitors and offenders, there is a clause specially excepting from its effect this very Serle and "THOMAS WARDE *de Trumpington*,¹ QUE SE PRETENDE, ET FEIGNE D'ESTRE ROY RICHARD." As far as I can yet find, this is the first public intimation of a person (*Warde*) not noticed before in any relative disquisition. Against the same Warde, the English Government most seriously proceeded, for it is instructed even by much later proof, *that he had been attainted, and his small property given to strangers, and it is remarkable he is not there described as deceased.*² From the mention of Serle and Warde in this manner together, and Serle's previous conduct, &c. it seems clear that they were implicated in the same affair. Serle, in 1404, upon being captured in Scotland, and confessing his guilt, and the imposture, was capitally punished, but as to the fate of Warde nothing transpires from the English Records. We only learn further from them, that *one Warde held the office of pavilion-maker to Richard II.* in the first year of his reign, which must have brought him occasionally near the person of his Sovereign, and that another of the name had been *valet* of his grandfather Edward III.

"Now, *my theory* from these facts *is*, that the rumour or belief of Richard's escape to Scotland had principally for its groundwork a plot or combination, aided by the Scotch, between Warde and Serle. The last certainly, and the former

¹ The words in another copy, in Latin, are "*qui se nominabat esse Regem Ricardum.*"

² The supposed Richard is stated to have lived in Scotland till 1419, and to have died there. The true Richard's death is given in 1399.

[This is the important grant of the escheat of Warde in 1409, admitted to be so by the writer in the Gentleman's Magazine, though only supposed by him to have been recently adduced.]

not impossibly, once *filling subordinate posts* in Richard's household. Which was the previous mover, and originated the rumour, is immaterial, but Warde was a fit instrument for the purpose, if, independently of the advantages of intimate acquaintance, either from his own or Serle's experience, with the manners, character, and private history of Richard—and perhaps a little address and deceit—it be true, as stated in a proclamation of Henry IV. in 1402—at the moment he and Serle were in active operation—that the impostor bore a resemblance to Richard. Admitting all this, *we have then the supposed Richard*, he who made so much noise in England and Scotland for a time—in *the person of Thomas Warde*—in support of which conclusion there is at least, it must be admitted, direct evidence *from English Record*, and thus affecting the credibility of our Exchequer Rolls.

“I apprehend the sudden appearance of the supposed Richard in Scotland at the period of the machinations of Warde and Serle, *and the public oblivion of him in England very shortly* after the exception of these persons from the pardon, and death of the last, to be in unison with the inference. *The silence as to the fate of Warde, the mock King, is also material*—secretly acting that character in Scotland, he would naturally be lost sight of in England. Nor should it be forgot that similar impositions by Court underlings occurred at later stages of the English history.

“Such is my theory, and it is but a theory, for I too well know the uncertainty attending ancient historical speculations to affix absolute belief to any thing of the kind. It may be liable to some objections, *although I think not conclusive ones*—of which character may be Winton's account of the supposed Richard;—but I need go no more into detail, as far greater justice will be done them by Mr. Tytler.

“On the other hand, I have still to urge, *inter alia*, on my side, *the positive belief of old English authorities and cotemporaries, even of the French who were devoted to Richard II., that the true Richard died in 1399, his corpse or face being*

openly exhibited to the public in London ; and further, that the Scotch never made any open use of the supposed Richard, a thing most remarkable, and not to be explained by any imaginary policy of Henry IV., or understanding between him and Albany, if such be contended. It may be here asked, did Henry IV. so act in respect to James I., a true monarch, whom he contrived to get into his custody ? The reverse is indubitable—James was every where exhibited in the most public manner, and carried by his son Henry V. into France, that his presence might recal his subjects from the ranks of the French army.—If the Scottish Richard had been Richard the Second, surely he would have been treated something in the same way, in exclusion to the opposite system of concealment and confinement that was preferred, and has always, more or less, been the striking feature of every case of imposture. And if the true Richard had not died in 1399, *why the unexplained blank in his history and motions from that date down to as far as 1402, when his counterpart so suddenly emerges in Scotland, at the very moment of the attempt of Warde and Serle ?*

There is here an utter void of legal notices, there being nothing to fill up the gap but probably the surmises of Scottish Chroniclers, which seem too small a counterpoise to the remarkable taciturnity that otherwise prevails. I must, too, with all submission, be allowed to question these positions (as I suppose them to be) of Mr. Tytler, whom it was very natural some things might have escaped amid his varied historical inquiries—1. *That Henry's reign was disturbed by perpetual reports of Richard being alive.* 2. *That they were regarded as fabulous by all future (subsequent) historians.* 3. *That his existence in Scotland can be proved by incontestible evidence—without dwelling upon the assertion of its going for the first time to be published to the world. As to the first proposition, I rather imagine these reports (though I may be mistaken,) as I have hinted, died away in England long before the death of Henry IV.* In respect to the second, I can pointedly refer to Bowar, who lived early in the 15th century, and who with Bellenden, not only asserts the ex-

istence and demise of Richard in Scotland, but firmly believes in it. For proof equivalent to that in the last, I have in vain sought ; at any rate, it has not been forthcoming. In any discussion, it is important to be sure as to fact, not always attainable, which makes me so particular ; and with these remarks, and referring to my original proposition of there being no incontestible evidence of the alleged survival of Richard II., I shall bid adieu, at least for the present, to a topic that the above author is so fully able to render curious and interesting. I need only add, my later authorities are the Patent, and closed Rolls, Rymer, *Placita Parliamentorum*, the old English Chronicles, Histories, &c.

“ J. R.”

At this period the author had pretty well formed his opinion upon the subject of Richard II., which did not strike him as attended with much difficulty, but other things subsequently engrossing his attention, it was only recalled to the question in the way stated in his Tracts. In fact, his chief object was in a manner to record his own views,—no unnecessary precaution it would seem, from what has since occurred.

AFFIDATIO SCOTORUM.

(referred to, at ps. 126—8.)

OMNIBUS hominibus hoc scriptum visuris, vel audituris, Patricius Comes de Dunbar, Patricius, Johannes, et Alexander filii ejus, Walterus Senescallus Comes de Meneth, Alexander, et Johannes filii ejus, Robertus de Bruse Dominus Vallis Anandie, et Robertus de Bruse Comes de Carryk, ac Bernardus de Bruse

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fili ejus, Jacobus Senescallus Scotie, et Johannes frater ejus, Enegus filius Dovenaldi, et Alexander filius eius legitimus, eternam in Domino salutem. Noverit universitas vestra *nos* per presens scriptum nostrum *nos obligasse, et fideliter promississe*, ac promissum nostrum corporali sacramento, tactis sacrosanctis evangelis, et per fidei nostre dationem vallasse, quod *nos cum tota potentia nostra* indeficienter *adherebimus nobilibus viris Domino Ricardo de Burgo Comiti Ultonie, et Domino Thome de Clare, in omnibus negotiis, et cum eis atque complicibus suis fideliter stabimus, contra omnes eis adversantes*, salva fide domini Regis Anglie, et salva fide illius qui regnum Scotie, ratione sanguinis felicitis recordationis domini Alexandri regis Scotie qui ultimo obiit, adipiscetur, et obtinebit, secundum antiquas consuetudines hactenus in regno Scotie approbatas, et usitatas; et si contingat *aliquem nostrorum contra presentem obligationem nostram*, et contra presens compromissum nostrum *in aliquo venire* quod absit, volumus et concedimus pro nobis omnibus, et pro singulis nostrorum, *quod dicti nobiles Comes Ultonie, et Thomas de Clare cum omnibus suis complicibus, et confederatis super illum currant*, ad ipsum, et omnia bona sua destruenda, nisi ab errore suo resiliat, et ad condignam venerit satisfactionem, *secundum visum, et considerationem dictorum nobilium Comitis Ultonie, et Thome de Clare, et eorundem complicitum ac confederatorum*, in cujus rei testimonium presenti scripto sigilla nostra fecimus apponi. Datum apud Turneberry in Carryk die veneris, in vigilia beati Mathei apostoli Anno gratie Mcc octogesimo sexto.

It is quite evident that the obligation is solely on the part of the Scots, who are bound upon their oath, as in every letter of Manrent, to assist and defend the Earl of Ulster, Clare, and their vassals "against all deadly," excepting the respective sovereigns of the parties, with the natural penalty in case of infraction of their agreement. Such being the case, the deed is simply an "*affidatio*," (as it is entitled,) or qualified act of fealty by the former to the latter, and we clearly see what foundation there is for the statement of Mr Tytler, that,—“ These Barons, (in-

cluding the Earl of Ulster, Clare, and the remainder,) now entered into a bond, or covenant, by which it was declared that they would thenceforth *adhere to*, and take *part with one another on all occasions*, against all persons,"¹ &c. It may be only added, that what has been noticed in the History of the same gentleman, merely transpired upon a casual survey, *ad aperturam Libri*.

NATURALIZATION OF SANDY NAPIER, ANCESTOR OF THE
NAPIERS OF LUTON-HOO, DATED 14TH APRIL 1541.

(*Referred to at page 64.*)

HENRICUS OCTAVUS dei gratia Angliæ, et Franciæ Rex, fidei Defensor, Dominus Hiberniæ, et in terra supremum caput Anglicanæ ecclesiæ. Omnibus ad quos presentes Literæ pervenerint, Salutem, SCIATIS quod nos de gratia nostra speciali concessimus SANDY NAPER sub Dominio Regis Scotorum oriundo, seu quocunque alio nomine, sive additione nominis idem Sandy censeatur, quod ipse de cetero ad totam vitam suam sit indigenus, et verus Ligeus noster, et heredum nostrorum. Et quod ipse in omnibus tractetur, reputetur, habeatur, teneatur, et gubernetur tanquam fidelis Ligeus noster infra Regnum nostrum Angliæ oriundus, et non aliter, nec alio modo. Quodque idem Sandy omnes et omnimodas actiones reales, personales, et mixtas in omnibus Curijs, Locis, et iurisdictionibus nostris habere, exercere, eisque uti, et gaudere, ac eas in eisdem placitare, et placitari, respondere, et responderi, defendere et defendi possit, in omnibus, et per omnia sicut fidelis ligeus noster in dicto Regno nostro Angliæ oriundus. Et insuper quod dictus San-

¹ Hist. Vol. I. p. 65.

dy terras, tenementa, redditus, reversiones, et possessiones quascunque infra Regnum nostrum Angliæ, et alia Dominia nostra perquirere, recipere, capere, habere, tenere, et possidere, ac eis uti, et gaudere, ac ea dare, vendere, et alienare, ac Legare, cuicunque persone, sive quibuscunque personis sibi placuerit, licite et impune debeat, possit, et valeat, ad libitum suum, adeo liberè, quietè, integrè, pacificè, sicut possit, debeat, et valeat aliquis Ligeorum nostrorum infra dictum Regnum nostrum Angliæ oriundus. Et quod dictus Sandy de cetero in futuro, colore, vel vigore alicuius statuti, ordinationis, seu concessionis facti, aut fiendi, non arctetur, teneatur, seu compellatur ad solvendum dandum, faciendum, vel supportandum nobis, vel alicui heredum nostrorum, seu cuicunque alii aliqua taxa, tallagia, seu alia onera quecunque pro bonis, terris, tenementis, seu personis suis preterquam talia et tanta, qualia et quanta, alij fideles Ligei nostri infra dictum Regum nostrum Angliæ oriundi pro bonis, terris, tenementis, seu personis suis, solvunt, dant, faciunt, vel supportant, aut solvere, dare, facere, vel supportare, communiter consueverunt, et teneantur, et non aliter, nec alio modo. Sed quod dictus Sandy habere, et possidere possit, habeat, valeat, et possideat omnes et omnimodas libertates, franchises, et privilegia quecunque ac eis uti, et gaudere possit infra dictum regnum nostrum Angliæ, et iurisdictiones nostras adeo liberè, quietè, integrè, et pacificè, prout ceteri fideles Ligei nostri infra dictum Regnum nostrum Angliæ oriundi habere, possidere, uti et gaudere debeant, absque perturbatione, molestatione, inquietatione, impetitione, impedimento, vexatione, calumpnia, seu gravamine quocunque nostri, vel heredum nostrorum, Justiciariorum, Escaetorum, vicecomitum, aut aliorum officiariorum seu ministrorum nostrorum, vel heredum, nostrorum quorumcunque aliquibus Statutis, actibus, ordinationibus, provisionibus, seu proclamationibus, in contrarium ante hec tempora factis, editis, ordinatis, provisus seu proclamatis, vel faciendis, ordinandis, seu proclamandis, aut eo quod predictus Sandy sub Dominio Regis Scotorum oriundus fuerit, aut aliqua alia re, causa, vel materia quacunque, in aliquo non obstante

Proviso semper quod predictus Sandy homageum ligeum nobis faciet, ac Lott et Scott prout alii Ligei nostri faciunt et contribuunt, faciat et contribuatur, ut est justum, solvatque idem Sandy nobis et heredibus nostris custumas et subsidia pro bonis, et merchandisis suis, prout aliegni solvunt et solvere consueverunt. Proviso etiam quod idem Sandy ad omnia statuta, actus, et provisiones hujus Regni nostri Angliæ, et ad omnia et singula in eisdem contenta, et specificata teneatur, obligetur, et obediens sit juxta vim, formam, et effectum cujusdam actus provisionis, et statuti in hujusmodi casu in Parlamento nostro nuper editi et provisi. Eo quod expressa mentio de certitudine premissorum, aut de alijs donis, sive concessionibus per nos, vel per aliquem progenitorum nostrorum præfato Sandy ante hec tempora facta, in presentibus minime facta existit, aut aliquo Statuto, actu, ordinatione, provisione, sive restrictione in contrarium facta, edita, ordinata seu provisa, aut aliqua alia re, causa, vel materia quacunque in aliquo non obstante. In cujus rei testimonium has literas nostras fieri fecimus patentes. Teste me ipso apud Westmonasterium quarto decimo die Aprilis, Anno Regni nostri tricesimo secundo (1541.)

C. ASSHETON,

Per ipsum Regem, et de Data, &c.
pro tresdecim solidis, et quatuor denarijs solutis in hanaperio.

The passage in the above document, “solvatque idem Sandy nobis—custumas, &c., pro *bonis*, et *merchandisis suis*,” will not escape attention. It hence further transpires that Sandy had been previously engaged in trade, and business, from which, and other circumstances, the probability is that he was then considerably above age—thus rendering Mr. Napier’s conclusion, identifying him with a mere child of six, or seven at the time, still more glaringly untenable.

ADDENDA.

PAGE 11.—In further corroboration of the import of *Mensurandas* in the protest in 1485, it may be observed, that *Mensura*, under its acceptations, has been used equivalently to value or estimation. Thus we have *mensura currens*, present value, and the *Liber niger Scaccarii* intimates that William the Lyon, “ad castella custodienda assignabit *mensurabiliter* de redditu suo”—that is, he shall pay from his revenue to the amount or value of keeping them. In a deed in Madoxe’s *Formulare*, there are these words “et ad capiendum de eadem acra *mensurabiliter* in emendationem stagni sui”—to take (so much) from the acre by estimation, or proportion, for the expenses of improving, or embanking the Fen. See Du Cange *voce Mensurabiliter*. *Premonitione* at the conclusion of the protest in question, (p. 13,) is the same with “premonitione,” the first being a barbarous corruption of the latter, and equally denoting a fore-warning or premonition.

Since the date of his last performance, the author has met with authentic evidence, which goes to confirm the descent of the Gordon family from Princess Anabella, daughter of James I. who had been alluded to.¹ There is an Indenture, dated Edinburgh, 14th October, 1474, between John, Earl of Athol, and George, Earl of Huntly, husband of Anabella, whereby “Alexander of Gordon, sone, and apperand ayr to the said George,

¹ Tracts, &c. p. 84.

sall, God willing, marry, and haf to wif, als son as he cummys to lawful age, &c., Jehan, the dochter of the saide Johne, and failying of the saide Alexander, Adam, the sone of the saide george, and sa furthe, fra sone to sone lauchfullie gottin, or to be gottin to the saide George, apperand ayr to him," &c. These, therefore, could not have been of the last marriage of Earl George to Elizabeth Hay, daughter of the Earl of Errol, with whom, as is proved by a notorial instrument in 1476, he had not then cohabited,¹ and they must have been the lawful progeny of a previous alliance. The marriage between Alexander, and "Jehan," or Johanna, afterwards took place, and Adam the second son, having married the heiress of Sutherland, was the ancestor of the present family of Sutherland. The original of the above Indenture is in the Menzies Charter Chest.

¹ P. 85. The divorce between the Earl of Huntly, and Anabella, was pronounced on the 24th of July, 1471, and the bans between him and Elizabeth Hay in the text, were proclaimed on the 18th of August thereafter; but an impediment followed to their union.

FINIS.

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